

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15, 979

395

*Notes Court of Appeals
For the
in Chrono
10/15/1960*

Joseph W. Stewart
CLERK

ROBERT W. HICKS,

Appellant,

v.

ROBERT F. KENNEDY

Postmaster General of the United States, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD A. MEHLER

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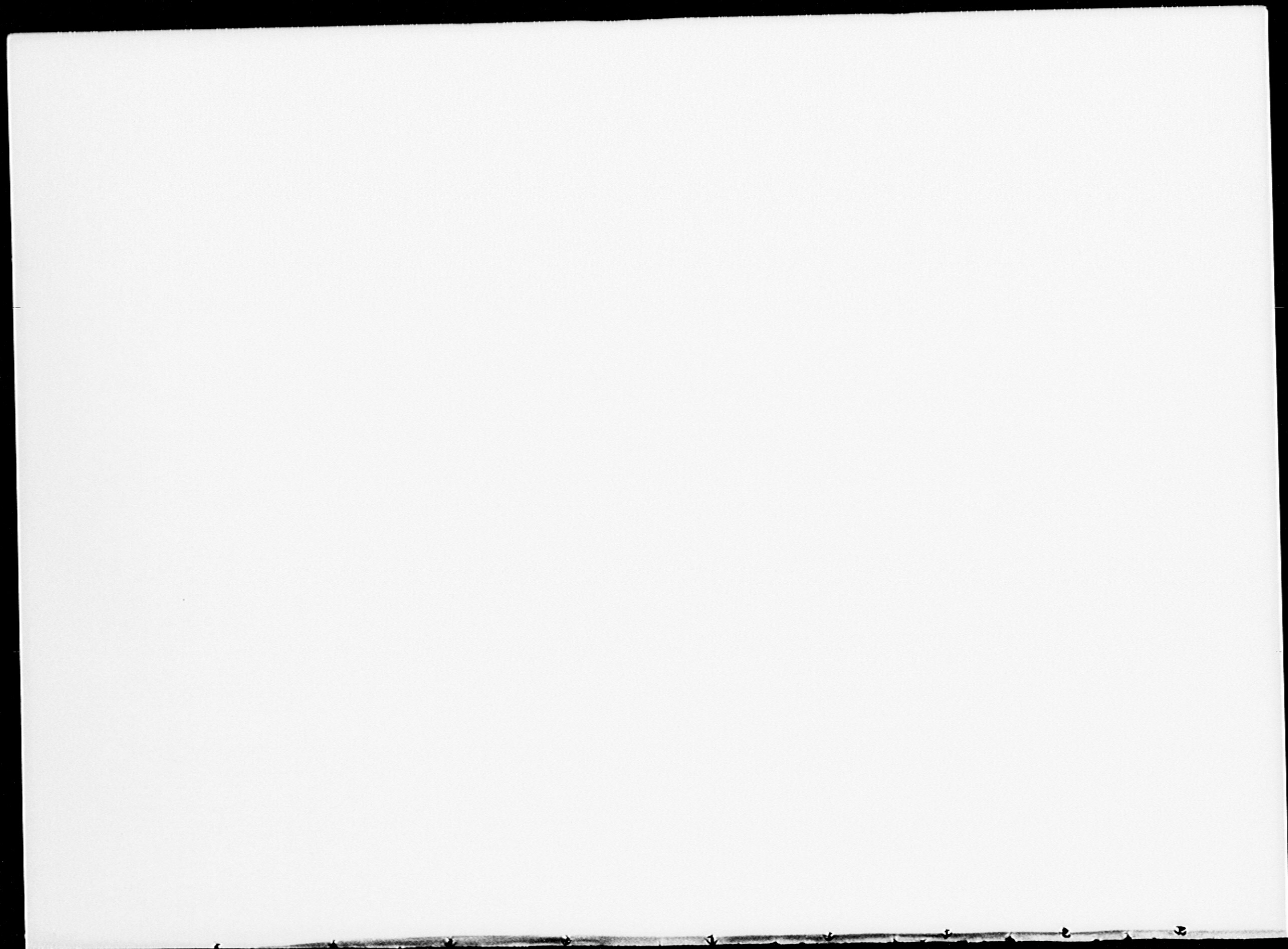


(i)

QUESTIONS PRESENTED

1. Whether a civil service employee who during the course of nineteen years of government service had acquired status in 1938, had been granted a competitive civil service status in 1947, given an Indefinite Appointment (in lieu of reinstatement) in 1954, converted in 1955 pursuant to an Executive Order from Indefinite Appointment to Career Appointment on the basis of "substantially continuous creditable service" for more than seven years prior thereto -- was a member of the classified civil service of the United States; and if he was,

2. Whether he was entitled in the event of his suspension without pay and in the event of his removal to the safeguards in such cases made and provided for by the Lloyd-LaFollette Act (5 U.S.C. 652).



(iii)

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 15, 979

ROBERT W. HICKS,

Appellant,

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an Order entered June 28, 1960 by the United States District Court for the District of Columbia denying Appellant's Cross-motion for Summary Judgment, granting Appellees' Motion for Summary Judgment, and entering judgment in favor of Appellees.

Jurisdiction of the District Court was invoked under Title 28, sections 2201 and 2202 of the United States Code and Title 11, section

315 of the District of Columbia Code. This Court has jurisdiction under Title 28, Section 1291 of the United States Code.

The pleadings showing the existence of jurisdiction are the Complaint (J.A. 3, 4) and Answer (J.A. 6).

STATEMENT OF THE CASE

This action was brought by the Appellant (plaintiff below) for restoration of his employment with the United States Post Office Department from which he claims he was wrongfully suspended and removed. Appellees (defendants below) are Arthur E. Summerfield, who was sued individually and as Postmaster General of the United States, and Robert W. Jones, Frederick J. Lawton, and Barbara Bates Gunderson, who were sued individually and as a group comprising the United States Civil Service Commission.

A similar suit filed by the same Appellant on October 5, 1956 was dismissed without prejudice on the ground that there had been no substitution of parties for two of the Appellees' predecessors in office who at the time of the filing of that suit were members of the Civil Service Commission but who during its pendency had resigned. That litigation (Hicks v. Summerfield, 104 U.S. App. D.C. 286, 261 F. 2d 752) did not conclude until April 6, 1959 when Appellant's Petition for a Writ of Certiorari was denied (359 U.S. 959). This action was thereafter filed on May 22, 1959.

Until the time of his removal complained of, Appellant was a career civil servant having been employed by various agencies of the United States Government for a period of about nineteen years (J.A. 24). According to the Commission's letter dated June 21, 1954, their own records show that Appellant acquired status in the War Department, Engineer Department at Large, on May 1, 1938 (J.A. 27). In the same letter Appellant was advised that he then had a "competitive civil service

status by reason of a probational appointment on July 1, 1947 as Patent Examiner, P-2, \$3,397.20 p.a., in Dept. of Commerce, Pat. Office, D. C."

Thereafter, as it appears from Notification of Personnel Action, Standard Commission Form 50, effective October 25, 1954, plaintiff was officially notified of his "Indefinite Appointment (in lieu of reinstatement)" under the authority of Civil Service Regulation 7.105(a)(1) to the position of Engineering Draftsman (Mechanical) with the Post Office Department at a salary of \$4,205.00 per annum" (J.A. 28). This was the same position that he held continuously until the date of his removal at which time, however, his salary had been increased to \$4,525.00 per annum (J.A. 5). The notice last mentioned reveals further that Appellant's probational period had been completed and confirms that he had acquired civil service status by virtue of an appointment on July 21, 1947 as Patent Examiner with the Patent Office, Department of Commerce, and subsequent service.

Still later, by Notification of Personnel Action, Standard Commission Form 50, effective January 23, 1955, Appellant was informed of his conversion from Indefinite Appointment to Career Appointment on the basis of "substantially continuous creditable service from 7-21-47 to 5-9-54" (J.A. 29).

Appellant next heard from the Appellee Summerfield to the effect that as of August 25, 1955 he had been suspended without pay by the Post Office Department upon the express instructions of the Appellee Commission (J.A. 19). Prior to his suspension, Appellant had retained counsel who wrote the Commission on August 20, 1955 asking for detailed findings "to support the charges set forth in the form of conclusions and constituting the derogatory information on the basis of which the Commission acted" (J.A. 11, 12 and 19). In reply to counsel's letter, the Commission merely restated their decision to remove Appellant from his position in the Post Office Department (J.A. 19).

Presumably in accordance with this decision, Appellant was advised by Notification of Personnel Action dated October 7, 1955, and effective the same date, of his removal from his employment on the grounds stated therein as follows:

"For false and misleading statements in your Civil Service papers concerning separations from previous employments and experience, and other evidence of unsuitability for government employment."

On November 2, 1955, Appellant's counsel again wrote the Commission requesting among other things that Appellant's "appeal" from the Commission's decision be reopened and that, consistent with the provisions of the Lloyd-LaFollette Act, he be furnished with a specific statement of the charges against him and with the opportunity to answer the findings therein requested (J.A. 15-19). But as before, counsel's requests were given no appropriate response.

The instant suit came before the Court on March 23, 1960 on cross motions for summary judgment filed respectively by the Appellant and the Appellees. By Order dated June 28, 1960, District Court Judge Luther W. Youngdahl denied Appellant's motion but granted Appellees' motion for summary judgment and entered judgment in favor of Appellees. From this Order Appellant noted this appeal on July 26, 1960.

It should be mentioned that in their answer filed July 7, 1959, Appellees set forth five separate defenses. However, since the District Court's Order is silent as to which of one or more of these defenses were relied upon by the Court in entering judgment for the Appellees, the Appellant will not in this brief anticipate the Appellees' arguments on appeal believing that, if they need be discussed at all, they would more properly be the subject of a reply brief.

STATUTES AND RULES INVOLVED

Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. 652(a), providing in pertinent part:

"(a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. . . ."

United States Civil Service Commission's Departmental Circular 776, providing in pertinent part:

"Employees serving under indefinite appointments in the competitive service on January 23, 1955, which appointments were made noncompetitively and based upon prior service with a competitive status, shall have their appointments in their positions occupied on that date converted to career or career conditional, effective January 23, 1955, dependent upon whether they meet or fail to meet the service requirement for career appointment.

* * *

"Documents in the employees' personnel folders, e.g., the Standard Form 50, are the only sources for determining eligibility for conversion of these employees. The following authority citations will satisfy this requirement: (1) 7.105(a)(1) . . . The determination of eligibility shall be based on these records alone."

Executive Order 10577, providing in pertinent part:

"(c) All employees in the competitive service who on the effective date of this order are serving under indefinite appointments made noncompetitively based upon prior service with a competitive status

shall, as of the effective date of this order, have their appointments converted to career-conditional appointments if they have had less than three years of creditable service, and to career appointments if they have had three years or more of such service under either permanent or indefinite appointment."

United States Civil Service Commission's Federal Personnel Manual, Section S-2-11, providing in pertinent part:

"The term 'competitive service' as applied to persons, includes those employees with competitive status who are serving under permanent or indefinite appointment in competitive positions. In this sense, the competitive service has the same meaning as the 'classified service,' 'classified (competitive) service' or 'classified civil service' as defined in existing statutes (notably the Act of March 27, 1922) and Executive Orders."

STATEMENT OF POINTS

1. That both at the time of his suspension without pay and at the time of his removal from his employment with the Post Office Department, Appellant was a member of the classified civil service of the United States and entitled to the procedural safeguards provided for in the Lloyd-LaFollette Act (5 U.S.C. 652).
2. That both Appellant's suspension without pay and his removal from such employment was improper and contrary to law in that in effecting such suspension and such removal the Appellees failed in every material respect to comply with the requirements of the said Act.

SUMMARY OF ARGUMENT

Stated briefly, Appellant's argument is that both on August 25, 1955, when he was suspended without pay, and on October 7, 1955, when he was removed from his employment with the Post Office Department, he was

a member of the classified civil service of the United States and, therefore, entitled to the safeguards in such cases made and provided for by the Lloyd-LaFollette Act (5 U.S.C. 652) but which were denied him. As a result, Appellant takes the position that both such suspension and such removal were contrary to law and that this Court should, therefore, restore him to his employment with the Post Office Department retroactive to August 25, 1955, the date of his suspension without pay.

ARGUMENT

APPELLANT WAS DENIED THE PROTECTION OF THE LLOYD-LAFOLLETTE ACT TO WHICH HIS EMPLOY- MENT WAS SUBJECT

It seems patent from the Civil Service Commission's records and the notices sent to Appellant that he enjoyed a classified civil service status both when he was suspended without pay on August 25, 1955 and when he was removed from the Post Office Department on October 7, 1955. His conversion on January 23, 1955 from Indefinite Appointment to Career Appointment on the basis of almost seven years of substantially continuous creditable service was made under the authority of the Commission's Departmental Circular 776, reading in pertinent part:

"Employees serving under indefinite appointments in the competitive service on January 23, 1955, which appointments were made noncompetitively and based upon prior service with a competitive status, shall have their appointments in their positions occupied on that date converted to career or career conditional, effective January 23, 1955, dependent upon whether they meet or fail to meet the service requirement for career appointment.

*

*

*

*

"Documents in the employees' personnel folders, e.g., the Standard Form 50, are the only sources for determining eligibility for conversion of these employees. The following authority citations will

satisfy this requirement: (1) 7.105(a)(1) . . .
The determination of eligibility shall be based on
these records alone."

In turn, Departmental Circular 776 was authorized and directed by
Executive Order 10577 (J.A. 30-32), Section 201 (c) of which states:

"(c) All employees in the competitive service who
on the effective date of this order are serving under
indefinite appointments made noncompetitively
based upon prior service with a competitive status
shall, as of the effective date of this order, have
their appointments converted to career-conditional
appointments if they have had less than three years
of creditable service, and to career appointments if
they have had three years or more of such service
under either permanent or indefinite appointment."

Plaintiff qualified for the conversion to career appointment in every
material respect required by Section 201 (c) of Executive Order 10577
quoted above. Thus, it may be seen that:

As to Whether Appellant Was "in the competitive
service" --

The definition of the term "competitive service" is contained in
Section S-2-11 of the Commission's Federal Personnel Manual, which
says:

"The term 'competitive service' as applied to per-
sons, includes those employees with competitive
status who are serving under permanent or in-
definite appointment in competitive positions. In
this sense, the competitive service has the same
meaning as the 'classified service,' 'classified
(competitive) service' or 'classified civil service'
as defined in existing statutes (notably the Act of
March 27, 1922) and Executive Orders." (J.A. 33)

Indeed, under this definition Appellant was not only "in the competi-
tive service" but by the same token was a member of the "classified
civil service" (Roth v. Brownell, 94 U.S. App. D.C. 318, 215 F. 2d 500)
and, even lacking his career appointment, was therefore entitled to the
protection of the procedural safeguards of the Lloyd-LaFollette Act.

As to Whether Appellant Occupied a "competitive position" --

This question is likewise resolved by Section S-2-11 of the Commission's Federal Personnel Manual which defines competitive service in terms of competitive positions, that is, civilian positions in the Executive Branch of the Government of which, of course, the Post Office Department is one.

As to Whether Appellant Was Serving Under an "indefinite appointment made noncompetitively based upon prior service with a competitive status."

The effective date of Executive Order 10577 was January 23, 1955, the very date upon which the Appellant's conversion to career appointment became effective. The fact that Appellant was then serving under an "indefinite appointment made noncompetitively based upon prior service with a competitive status" appears expressly from the Commission's notifications given, respectively, on June 21, 1954 (J.A. 27), October 25, 1954 (J.A. 28) and January 23, 1955 (J.A. 29).

As to Whether Appellant Had More Than "three years of creditable service."

The Commission's Notice dated January 23, 1955 answers this question in the affirmative, stating as it does, that Appellant's conversion to career appointment was made on the basis of "substantially continuous creditable service from 7-21-47 to 5-9-54."

Being as he was then a member of the classified civil service plaintiff was entitled, in the event his removal was sought, to the fundamentals of due process, all as contained in the Lloyd-LaFollette Act;¹ namely, (1) notice of the seeking of his removal and of any charges preferred

¹ 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. 652 (a).

against him; (2) a copy of such charges; (3) a reasonable time for the filing of a written answer to such charges, with affidavits; and (4) a written decision on such answer at the earliest practicable date.

Notwithstanding, Appellant was afforded none of these safeguards unless it can be said that the Notice of his Removal on October 7, 1955 was a written decision complying with the fourth requirement enumerated in the statute. Even the letters of Appellant's counsel written to the Commission on August 20, 1955 (J.A. 11, 12 & 19) and on November 2, 1955 (J.A. 15-19) calling the Act and its provisions to the attention of the Commission and insisting upon their implementation were ignored.

In the circumstances, the intent of the Congress was circumvented and the Appellant's removal from his employment was, accordingly, contrary to law.

CONCLUSION

For the foregoing reasons, the Appellant respectfully submits that the judgment of the lower Court should be reversed and judgment entered effectively restoring Appellant to his employment with the Post Office Department retroactive to August 25, 1955, the date of his wrongful suspension therefrom without pay.

RICHARD A. MEHLER

CHARLES P. HOVIS

Mehler, Goldsborough & Ives
2000 K Street, N. W.
Washington, D. C.

Attorneys for Appellant

(i)

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JOINT APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT W. HICKS
1809 H Street, N.W.
Washington, D. C.,

Plaintiff,

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the
United States,
United States Post Office
Department, Washington, D.C.
(Individually, and as Postmaster
General of the United States of
America)

and

ROGER W. JONES
FREDERICK J. LAWTON
BARBARA BATES GUNDERSON
United States Civil Service
Commission, Washington, D.C.
(Individually, and as a group com-
prising the United States Civil
Service Commission),

Defendants.

Civil Action
No. 1420-'59

DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
<u>1959</u>	
May 22	Complaint, appearance; filed.
May 22	Summons, copies (4) and copies (4) of Complaint issued; All defts. ser. 5-25-59, U.S. Atty. ser. 5-22-59, Atty. Gen. Ser. 5-29-59.
July 7	Answer of defts. to complaint c/m 7-7-59; App. Oliver Gasch, Edw. P. Troxell, John F. Doyle & Harold D. Rhynedance, Jr.; filed.

Proceedings

<u>Date</u>	
<u>1959</u>	
July 7	Calendared (N)
Oct. 21	Motion of debt for summary judgment; c/m 10/21/59; P&A; affidavits (3); exhibits (9), M.C. 10/21/59; filed.
Oct. 30	Stipulation of counsel extending time for pltfs to reply to motion for summary judgment to and including 1/8/60; filed.
Oct. 30	Order extending time to and including 1/8/60 for pltf to reply to debts' motion for summary judgment. (N) Keech, J.
<u>1960</u>	
Jan. 6	Stipulation in Re: extension of time for pltf. to reply to motion for summary judgment; filed.
Jan. 7	Order approving stipulation extending time of pltf to reply to debts' motion for summary judgment to and including February 1, 1960. (N) Curran, J.
Feb. 1	Cross motion of pltf for summary judgment; P and A in support and in opposition to debts motion for summary judgment; affidavit; c/s 2-1-60; Exhibits; M.C. 2-1-60; filed.
Feb. 8	Opposition of debt to pltfs cross motion for summary judgment. c/m 2-8-60; filed.
Mar. 2	Supplemental Affidavit of pltf in support of his cross motion and in opposition to debts motion for summary judgment; c/m 3-3-60; Exhibits; filed.
Mar. 23	Motion of debts for summary judgment; filed.
Mar. 23	Pltfs cross-motion for summary judgment - both argued & taken under advisement. (Rep. by Dawn T. Copeland) Youngdahl, J.
June 28	Order denying motion of pltf for summary judgment and granting motion of debts for summary judgment. Micro. 6-29-60 (N) Youngdahl, J.
July 26	Notice of appeal by pltf from order 6-28-60; copy to H. Rhynedance; deposit of \$5.00 by C. Hovis; filed.

[Filed May 22, 1959]

COMPLAINT FOR DECLARATORY JUDGMENT AND
MANDATORY INJUNCTION AND OTHER RELIEF

The plaintiff for his claim respectfully states to the Court as

follows:

1. That jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. Sections 2201-2202 and D.C. Code (1951 Ed.) Sec. 11-315.

2. That the defendant, Arthur E. Summerfield, is sued as an individual and as the Postmaster General of the United States of America; that the defendants Roger W. Jones, Frederick J. Lawton and Barbara Bates Gunderson are sued individually and as a group comprising the United States Civil Service Commission.

3. That at all times material to this complaint and particularly on October 7, 1955, the plaintiff was a member of the classified Civil Service of the United States being then employed as such by the United States Post Office Department as Engineering Draftsman (Mechanical), Grade G.S. 818-7, earning a salary of \$4,525.00 per annum.

4. That by notice entitled "Notification of Personnel Action" dated October 7, 1955 and effective the same date, a copy of which is attached hereto and incorporated herein by reference as Plaintiff's Exhibit "A," the plaintiff was informed of his removal from his said employment by the defendants.

5. That such removal of the plaintiff was improper, it was contrary to law, and it failed in every material respect to comply with the requirements of the Lloyd-LaFollette Act, 5 U.S.C. 652, the provisions of which were applicable to plaintiff in his said employment and which read in pertinent part as follows:

"No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is

sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. . . . "

6. That by reason of his wrongful removal as aforesaid, the plaintiff has been deprived of his rights in his said employment, his service as a federal career employee has been barred, and he has otherwise lost valuable sick leave, insurance, and retirement benefits.

7. That plaintiff has exhausted all of his administrative remedies and that he is without remedy other than by this action to enforce his rights in the premises.

WHEREFORE, the premises considered, plaintiff prays:

1. That this Court issue a judgment declaring plaintiff entitled to a restoration of his employment with the United States Post Office Department as aforesaid, retroactive to October 7, 1955.
2. That this Court issue a preliminary and permanent mandatory injunction requiring the defendants to restore plaintiff to his employment with the United States Post Office Department as aforesaid, retroactive to October 7, 1955.
3. And for such other and further relief as to the Court may seem just and proper.

MEHLER, GOLDSBOROUGH & IVES

By: /s/ RICHARD A. MEHLER
Attorneys for Plaintiff
2121 K Street, N.W.
Washington 7, D. C.

5
PLAINTIFF'S EXHIBIT A

STANDARD FORM 50
REV. APRIL 1951
PROMULGATED BY
CIVIL SERVICE COMMISSION
U. S. FEDERAL PERSONNEL MANUAL

POST OFFICE DEPARTMENT
BUREAU OF PERSONNEL
WASHINGTON, D. C.

NOTIFICATION OF PERSONNEL ACTION

1. NAME (MR., MISS, MRS., ONE GIVEN NAME, INITIALS, AND SURNAME) Mr. Robert W. Hicks		2. DATE OF BIRTH 10/14/04	3. JOURNAL OR ACTION NO. 10/7/55
This is to notify you of the following action affecting your employment:			
4. NATURE OF ACTION (USE STANDARD TERMINOLOGY) Removal #	5. EFFECTIVE DATE 10/7/55	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY CS Central Office Ltr. of 9/28/55, BUREAU STPS	
FROM TO			
8. POSITION TITLE Engineering Draftsman (Mechanical)		9. SERVICE, SERIES, GRADE, SALARY GS-818-7, \$4525 per annum	
10. ORGANIZATIONAL DESIGNATIONS Bureau of Facilities Division of Real Estate Design Engineering Section Washington, D. C.		11. HEADQUARTERS	
12. FIELD OR DEPT. L. ☒ DEPARTMENTAL ☐ FIELD		13. POSITION CLASSIFICATION ACTION Subject to FICA (Yes-No)	
14. VETERAN'S PREFERENCE ☒ NONE ☐ OTHER S.P.T. ☐ 10-PART ☐ DISC. OTHER		15. NEW VICE I. A. REAL.	
16. SEX ☒ M ☐ F		17. APPROPRIATION General Administration	
18. SUBJECT TO C.S. RETIREMENT ACT (YES-NO) YES		19. DATE OF APPOINTMENT AFFIDAVIT (ACCESSIONS ONLY)	
20. REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements. The classification grade of this position is subject to post-audit and correction by the Post Office Department or Civil Service Commission.		21. LEGAL RESIDENCE ☒ CLAIMED ☐ PROVED STATE, CO., etc.	
22. SIGNATURE OF OTHER AUTHENTICATION W. H. Campbell Director Departmental Personnel Division			

ENTRANCE PERFORMANCE RATING,
fine

1. EMPLOYEE COPY

COPY AVAILABLE
Original bound volume

[Filed July 7, 1959]

A N S W E R

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering the numbered paragraphs of the complaint specifically, defendants aver as follows:

1. Defendants are not required to answer the allegations contained in paragraph 1.
2. Admitted.
3. Admitted, except the defendants deny that plaintiff was a member of the classified Civil Service at the time alleged and aver that his appointment to the position alleged was subject to investigation by the Civil Service Commission.

4. Admitted.

5. and 6. Denied.

7. It is admitted that plaintiff has exhausted his administrative remedies; the remaining allegations contained in paragraph 7 are denied.

Third Defense

Complaint is barred by laches.

Fourth Defense

The procedure followed by the Civil Service Commission and the Post Office Department was in all respects legal and proper.

Fifth Defense

Complaint is moot for the reason that plaintiff has retired from Government service.

WHEREFORE, having fully answered, defendants demand judgment, together with the costs of this action.

/s/ OLIVER GASCH,
United States Attorney

/s/ EDWARD P. TROXELL, Principal
Assistant United States Attorney

/s/ JOHN F. DOYLE,
Assistant United States Attorney

/s/ HAROLD D. RHYNDANCE, JR.,
Assistant United States Attorney
Attorney for Defendants

[Certificate of Service]

[Filed October 21, 1959]

MOTION FOR SUMMARY JUDGMENT

Come now defendants by their attorney, the United States Attorney, and move for summary judgment on the ground that there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

Attached hereto and made a part hereof are the affidavit of Andrew E. Ruddock, Director, Bureau of Retirement and Insurance, Civil Service Commission, identified as Exhibit I, and certified copies of the records of the Civil Service Commission pertaining to plaintiff, identified as Exhibits II and III.

/s/ OLIVER GASCH,
United States Attorney

/s/ EDWARD P. TROXELL,
Principal Assistant
United States Attorney

/s/ JOHN F. DOYLE,
Assistant United States Attorney

/s/ HAROLD D. RHYNEDANCE, JR.,
Assistant United States Attorney

[Certificate of Service]

[Filed October 21, 1959]

DISTRICT OF COLUMBIA)

) ss

CITY OF WASHINGTON)

Defendant's Exhibit I

A F F I D A V I T

I, Andrew E. Ruddock, Director, Bureau of Retirement and Insurance, United States Civil Service Commission, having custody of the retirement records of retired Federal employees, including that of Robert W. Hicks, last employed by the Post Office Department, hereby depose and say:

These records disclose that said Robert W. Hicks was removed from such employment on October 7, 1955, and on March 30, 1956 executed application for annuity under the disability provision (5 U.S.C. 710) of the

Civil Service Retirement Act. The Civil Service Commission determined that this former employee was totally disabled for useful and efficient service in his position as required by said statute, and awarded him annuity at the rate of \$128.00 a month effective from November 1, 1955. This rate was increased to \$141.00 effective August 1, 1958 by the terms of Public Law 85-465. He has received this annuity continuously to date, which benefit will continue until the end of the month prior to the annuitant's death unless, before he attains age 60, he is found to be recovered or restored to earning capacity (5 U.S.C. 2257(d)).

/s/ ANDREW E. RUDDOCK, Director
Bureau of Retirement and Insurance

[Jurat dated October 9, 1959]

[Filed October 21, 1959]

Defendants' Exhibit III

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

I, William C. Hull, Executive Assistant to the Commissioners,
United States Civil Service Commission, certify that the documents
attached hereto, relate to the appeal in the suitability case of Robert
Waverly Hicks, and are true copies of official documents, under my
custody and control.

/s/ WILLIAM C. HULL

June 8, 1959
Washington, D. C.

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF DEPARTMENTAL OPERATIONS

Washington, D. C.

FOR U. S. GOVERNMENT USE ONLY

Date: AUG. 9, 1955

File: DIR:WAT:gho

Personnel Security Officer
Post Office Department
Washington 25, D. C.

Name Robert Waverly Hicks	
Date of Birth 10-14-04	CSC Serial No. 16.55.11860
EOD 10-25-54	Type of Appointment Competitive
Position and Location Engineering Draftsman Bureau of Facilities Washington, D. C.	

Dear Sir:

The appointment of the person identified above was authorized by your agency subject to investigation. The investigation disclosed derogatory information as shown on the attached sheet.

The appointee has been given an opportunity to make explanation regarding these matters, and the reply has been carefully considered but does not warrant a favorable decision. It has been determined that this employee does not meet the standards of suitability for Federal employees and the appointment is not approved. Therefore, your agency is instructed to separate this employee from the service on the fifteenth (15th) calendar day from the date of this letter.

Either your agency or the employee may appeal this decision provided such appeal is made to this office prior to the date on which removal is to be effected. If an appeal is made either by your agency or the employee, your agency is directed to suspend the employee on the date on which the removal was to be effected pending final adjudication of the appeal unless, in its discretion, your agency desires to retain the employee in an active duty status during that period. The employee should notify the personnel officer or head of the office at which he is employed if he submits an appeal. This office must be advised of the action taken under this letter within the fifteen-day period mentioned above.

The procedures in Parts 9 and 22 of the Civil Service Regulations are not applicable to a removal or suspension effected under authority of this letter. However, nothing in this letter precludes an agency from proceeding on its own initiative to remove or suspend an employee providing it complies with the requirements of Parts 9 or 22 of the Civil Service Regulations, Public Law 733, 81st Congress (Executive Order 10450) or other statutory authority, whichever is applicable.

The employee's application has been retained by the Commission. A notation to that effect, or this letter, should be placed in the official personnel folder in lieu thereof.

Very truly yours,

Enclosure 12110
Kimbell Johnson, Chief
Investigations Division

CC: Employee
1809 H Street, N.W., Apt. #5
Washington, D. C.

* * *

* * *

DEROGATORY INFORMATION ON WHICH ACTION IS BASED

In view of the circumstances which led to his separation from the Veterans Administration on May 9, 1954 and other evidence of dishonesty revealed by investigation, it has been determined that Mr. Hicks does not meet the standards of suitability required for employment in the competitive Federal service.

To Appointee:

This is your notification of the Commission's action in your case, as specified in this letter and also as follows:

You are barred from competing in civil service examinations or accepting employment in the competitive Federal service for a period of one year from the date of separation; and

All eligibility for reinstatement obtained by you as a result of your current appointment and any and all pending applications and existing eligibilities are cancelled.

If you submit an appeal to the Commission, it is necessary that you immediately advise the office to which this letter is addressed. If you are employed in a branch office or regional office of your agency other than the one to which the letter is addressed you should also notify the personnel officer or head of the office at which you are employed.

* * *

* * *

Law Offices
RICHARD A. MEHLER

Sterling 3-1025
Suite 517 Wyatt Building
777 Fourteenth Street, N.W.
Washington 5, D. C.

Mr. Kimball Johnson,
Chief, Investigations Division
Bureau of Departmental Operations
United States Civil Service Commission
Washington 25, D.C.

August 20, 1955

Dear Sir:

As attorney for Robert Waverly Hicks (d.o.b. 10-14-04) I am hereby notifying you of his appeal from the decision of your office contained in your letter dated August 9, 1955 to the Post Office Department, wherein you advised that Mr. Hicks has been found not to meet the standards of suitability for Federal employees, and wherein you disapprove his competitive appointment.

The derogatory information described on the sheet appended to your letter is so absent in specificity as to render it difficult, if not impossible, to form a reply. Notwithstanding, Mr. Hicks will separately submit a recapitulation of the exhibits heretofore filed in the case in an attempt to coordinate these exhibits with the questions propounded to him by your investigators, and the answers which he supplied to such questions. Mr. Hicks will also separately submit certain new evidence in exhibit form which has been discovered by him since receipt of your letter.

Toward the end of fairly and properly presenting the evidence in Mr. Hicks' behalf, I am respectfully requesting the following:

1. That your office furnish to me as attorney for Mr. Hicks the detailed findings, which you must have made, to support the charges set forth in the form of conclusions, and constituting the derogatory information on the basis of which your decision was reached in the case.
2. That your office afford the appellant reasonable time within which to present further and additional evidence on his behalf, and to answer the findings herein requested.
3. That an oral hearing be ordered on this appeal.

As I believe a review of the circumstances will show, this is a hardship case, and particularly so in the light of the fact that Mr. Hicks is a career Federal employee with almost twenty years service. An interruption of this service, especially where involuntary in nature, would have nothing but the gravest consequences.

I shall appreciate your acknowledgement of this letter and your earnest consideration of the requests above outlined.

Respectfully submitted,

/s/ RICHARD A. MEHLER

RAM:lm

UNITED STATES CIVIL SERVICE COMMISSION

NOTICE OF RECEIPT OF APPEAL

[Recv'd U.S.C.C. Board of Appeals & Review Aug. 25, 1955] Date: 8-23-55
File: DIR:WAT

Personnel Security Officer
Post Office Department
Washington 25, D. C.

Name of Employee	Position	Action Appealed
Hicks, Robert Waverly	Engineering Draftsman	
Agency and Installation at which employed		separation
Washington, D. C.		
Current Duty Status	Date and File of USCSC's Letter Directing Removal	Further Appeal Filed by [] Agency [x] Employee
	8-9-55	

The information above identifies an employee of your agency whose removal was directed by this office on the date indicated.

A further appeal from our decision has been filed. We have, therefore, referred the case to the Board of Appeals and Review, United States Civil Service Commission, Washington 25, D. C. In view of this fact, our previous direction for suspension, pending final adjudication of the appeal, will remain in effect unless your agency wishes to retain the employee in an active duty status.

The Board of Appeals and Review will advise you of its final decision as soon as it has completed its consideration of the case. In the meantime, please make a prompt report to the Board of any change in the duty status of the employee.

Nothing in this letter should be construed as precluding an agency from proceeding on its own initiative to remove or suspend an employee, providing it complies with the requirements of Parts 9 or 22 of the Civil Service Regulations; Public Law 733, 81st Congress (Executive Order No. 10450); or other statutory authority, whichever is applicable.

REGIONAL DIRECTOR,
Investigations Division

CC: Board of Appeals and Review (with case file)
Above identified employee at 1809 "H" St, NW
Apt 5, Washington, D.C.

BAR:EPT:rsp

September 28, 1955

PENDING IN BAR

Mr. Robert W. Hicks
1809 K Street, N.W.
Washington, D. C.

Dear Mr. Hicks:

This refers to your appeal from the action taken by the Commission's Investigations Division in rating you ineligible for Engineering Draftsman, Post Office Department, requesting your removal from this position and barring you from civil service examinations or

appointment in the Federal civil service for one year from date of your separation because of false and misleading statements in your civil-service papers concerning separations from previous employments and experience, and other evidence of unsuitability for Government employment.

A careful study of the entire record in your case, including the representations in your letter of August 23, 1955, has been completed. Because of the nature of the offenses leading up to the issuance of charges against you by the Veterans Administration and evidence of difficulties in previous Government employments it has been decided that you do not measure up to the standards of personal suitability required for Federal employees.

Accordingly, the action taken by the Commission's Investigations Division in rating you ineligible for Engineering Draftsman, Post Office Department, requesting your removal from this position and barring you from future appointment in the Federal civil service for one year from date of your separation is affirmed.

For the Commissioners:

Sincerely yours,

CC: Investigations Division
John E. Blann, Chairman
Board of Appeals and
Review

CC: Atty. Richard A. Mehler
Suite 517, Wyatt Bldg.
777 - 14th Street, N.W.
Washington 5, D. C.

CC: Personnel Security Officer
Post Office Department
Washington 25, D. C.

FILE RETAINED IN BAR

[Recv'd USCSC Nov. 3, 1955]
[Recv'd USCSC Board of
Appeals & Review Nov. 3, 1955]

Law Offices
RICHARD A. MEHLER

Sterling 3-1025
Suite 517 Wyatt Building
777 Fourteenth Street, N.W.
Washington 5, D. C.

* * *

November 2, 1955

John E. Blann, Chairman
Board of Appeals and Review
United States Civil Service Commission
Washington 25, D. C.

Re: Your file BAR:EPT:rsp
Your letter dated September 28, 1955

Dear Sir:

Under date of September 28, 1955 you advised me that the action taken by the Civil Service Commission in rating Mr. Robert Waverly Hicks unsuitable for Engineering Draftsman, requesting his removal and barring him from further appointment in the Federal civil service for one year from date of his separation was affirmed.

With your letter to me you enclosed copy of your letter to Mr. Hicks of the same date in which you advised him that the action taken by the Commission's Investigations Division in rating him ineligible for Engineering Draftsman, Post Office Department, requesting his removal from that position and barring him from future appointment in the Federal civil service for one year from date of his separation was affirmed.

In neither of your letters did you furnish the information requested in my letter to the Commission of August 20, 1955 from which I quote as follows:

"Toward the end of fairly and properly presenting the evidence in Mr. Hicks' behalf, I am respectfully requesting the following:

1. That your office furnish to me as attorney for Mr. Hicks the detailed findings, which you must have made, to support the charges set forth in the form

of conclusions, and constituting the derogatory information on the basis of which your decision was reached in the case.

2. That your office afford the appellant reasonable time within which to present further and additional evidence on his behalf, and to answer the findings herein requested."

As a preamble to this request I pointed out in my letter that the description of the derogatory information upon which the action of the Commission was based was so absent in specificity as to render it difficult, if not impossible, to form an answer. The pattern of due process under our law has not yet suffered a departure from the fundamental principle that a person who is charged with wrongdoing is entitled to notice of the particulars of the charges and the opportunity to make his answer. And this principle has received not only the approval but the unqualified recognition of the Congress in the Lloyd-LaFollette Act, specifically reading in pertinent part:

"Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; . . . " (underlining supplied)

It is my considered opinion that in the instant case there has been a failure to meet these requirements of the Lloyd-LaFollette Act, and therefore that the action of the Civil Service Commission and of the Post Office Department in removing Mr. Hicks from the classified civil service of the United States, of which he was a member, was contrary to law.

In this connection the Examiner assigned to this case on appeal stated to me in substance over the telephone that the following incidents were deemed to be of a character reflecting upon the suitability of Mr. Hicks for Federal employment:

1. The suspension action in November, 1942, with respect to his employment with the Corps of Engineers.
2. The matter of his arrest in April, 1944.
3. The matter which attended his employment at the Patent Office concerning the conduct of another employee.
4. The alleged failure of Mr. Hicks in his form 57 supplied to the Post Office Department to state that he had been forced to resign from his employment with the Veterans Administration.

While we must, because of the circumstances surrounding my conversation with the Examiner, consider the information which she furnished me as being of an unofficial nature, it nevertheless seems logical to assume that it played an important role in the decision of the Commission.

Given the opportunity, Mr. Hicks contends that the incidents described by the Examiner and any others giving rise to question can be satisfactorily explained and favorably resolved, leaving no fair inference which would be grounds for characterizing him as unsuitable for Federal service.

In view of the foregoing, it is respectfully and earnestly requested that the appeal be reopened and that:

- (a) The Commission advise whether or not the incidents described above were officially considered in reaching the decision in this case; and if they were so considered, that Mr. Hicks be allowed an opportunity to present evidence in explanation of such incidents and otherwise to file an answer thereto;
- (b) In the event there are incidents additional to those described above which received the official consideration of the Commission that they be furnished in a detailed manner sufficient to constitute notice and to reasonably allow for the framing of an answer;

- (c) A reasonable time be granted after notice within which to answer;
- (d) An oral hearing be granted; and
- (e) Pending final adjudication of his case Mr. Hicks be restored to his employment at the Post Office Department retroactively to the date of his removal.

Respectfully submitted,

/s/ RICHARD A. MEHLER

RAM:bms

[Filed February 1, 1960]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT W. HICKS,
Plaintiff,

v.

ARTHUR E. SUMMERFIELD, ET AL.,
Defendants

Civil Action No. 1420-59

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff and files this cross motion for summary judgment on the ground that there is no genuine issue of material fact and that the plaintiff is entitled to judgment as a matter of law.

In support of his cross motion plaintiff has attached hereto and is filing herewith his affidavit dated February 1, 1960 and his points and authorities with exhibits thereto attached.

MEHLER, GOLDSBOROUGH & IVES
By: RICHARD A. MEHLER
2121 K Street, N.W.
Washington 7, D. C.
Attorneys for Plaintiff

[Certificate of Service]

[Filed February 1, 1960]

A F F I D A V I T

ROBERT W. HICKS, being first duly sworn, deposes and says:

1. That he is the plaintiff in the above entitled cause and that he files this Affidavit in support of his Cross-Motion For and In Opposition to Defendants' Motion For Summary Judgment.

2. That as of August 25, 1955 he was suspended without pay by the Post Office Department upon the express instructions of the Civil Service Commission; but that prior thereto he had engaged counsel who, on his behalf, wrote the Civil Service Commission under date of August 20, 1955 asking for detailed findings "to support the charges set forth in the form of conclusions, and constituting the derogatory information on the basis of which" the Commission acted.

That in response to counsel's letter of August 20, 1955, the Commission merely confirmed the decision to remove affiant from his position in the Post Office Department.

3. That such removal was effected October 7, 1955 and on November 2, 1955 affiant's counsel again wrote the Commission requesting among other things that affiant's appeal be reopened and that, consistent with the provisions of the Lloyd La Follette Act, he be furnished with a specific statement of the charges against him.

4. That the requests of affiant's counsel contained in his said letters dated August 20, 1955 and November 2, 1955, copies of which are included among the defendants' exhibits in support of their Cross-Motion for Summary Judgment, were ignored.

5. By reason of illness which was believed connected with prior government service, affiant was ordered by the Federal Bureau of Employees Compensation to report to the United States Public Health Hospital, Baltimore, Maryland, on November 15, 1955 where affiant continuously remained as a bed patient until about January 16, 1956.

6. That during the course of such hospitalization, affiant was submitted to surgery on his left foot and for more than a month after his discharge from said hospital, that is, until about mid-February,

1956. was non-ambulatory being compelled to use a wheel chair; that thereafter, until about June, 1956 affiant was unable to walk without the use of crutches; and that this disability from walking persisted to a lesser degree until mid-May of 1957, during which latter period he was forced to use a cane.

7. That during all of this time affiant was either totally or partially disabled and unable to attend to his affairs or business without great difficulty, but that he nevertheless engaged counsel further for the purpose of protecting his rights in this case, as a result of which ~~his~~^{his} original action (CA 4031-56) referred to by the defendants in their points and authorities, was filed on ~~August 5~~^{September 5}, 1956.

8. That said civil action was not finally disposed of, and then without prejudice, until April 6, 1959, on which date the Supreme Court of the United States denied the affiant's Petition for Certiorari.

9. That this action was filed promptly thereafter on May 22, 1959.

10. That affiant did not apply for disability until April 6, 1956, which was retroactive to November 1, 1955 and then for a disability which was connected with service prior to both his suspension and removal.

11. That the delay, such as there was, in the bringing of an action following his suspension and removal from Federal employment was not attributable to affiant's fault or intention and that he attempted to the best of his ability and by such means as were within his control to seek the remedy to which he believes he is entitled.

12. That Exhibits "A" through "E", "G" and "H" attached to his points and authorities in the matter of the Cross-Motions for Summary Judgment and Exhibit "A" to his Complaint are true copies of original Civil Service Commission and Agency records and papers duly and officially issued.

/s/ ROBERT W. HICKS

[Jurat dated February 1, 1960]

[Filed February 1, 1960]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S
CROSS-MOTION AND IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

1. At the Time of his Removal Plaintiff Was a Member
Of the "Classified Civil Service."

Plaintiff was advised by the Civil Service Commission itself, hereinafter called the Commission, by its letter dated June 21, 1954, a copy of which is attached as Exhibit "A", that he then had a "com-petitive civil service status by reason of a probational appointment on July 1, 1947 as Patent Examiner, P-2, \$3397.20 p.a., in Dept. of Commerce, Pat. Office, D.C." This same letter indicates that, according to the Commission's records, the plaintiff had also acquired status in the War Department, Engineer Department at Large, on May 1, 1938.

Thereafter, as it appears from Notification of Personnel Action, Standard Commission Form 50, effective October 25, 1954, a copy of which is attached as Exhibit "B", plaintiff was officially notified of his "Indefinite Appointment (in lieu of reinstatement)" under the authority of Civil Service Regulation 7.105 (a) (1) to the position of Engineering Draftsman (Mechanical) with the Post Office Department at a salary of \$4,205.00 per annum. This was the same position that he held continuously until the date of his removal complained of, at which time, however, his salary had been increased to \$4,525 per annum. As it further appears from Exhibit "B", plaintiff's probationary period had been completed and, in confirmation of Exhibit "A", that plaintiff had acquired Civil Service Status by virtue of an appointment on July 21, 1947, as Patent Examiner, P-2, \$3397.20 per annum, Department of Commerce, Patent Office, Washington, D.C., and subsequent service.

Later, by virtue of Notification of Personnel Action, Standard Commission Form 50, effective January 23, 1955, a copy of which is attached hereto as Exhibit "C", plaintiff was notified of his conversion from Indefinite Appointment to Career Appointment on the basis of "substantially continuous creditable service from 7-21-47 to 5-9-54"

and under the authority of the Commission's Departmental Circular 776, reading in pertinent part:

"Employees serving under indefinite appointments in the competitive service on January 23, 1955, which appointments were made noncompetitively and based upon prior service with a competitive status, shall have their appointments in their positions occupied on that date converted to career or career conditional, effective January 23, 1955, dependent upon whether they meet or fail to meet the service requirement for career appointment.

* * *

"Documents in the employees' personnel folders, e.g., the Standard Form 50, are the only sources for determining eligibility for conversion of these employees. The following authority citations will satisfy this requirement: (1) 7.105 (a) (1) . . . The determination of eligibility shall be based on these records alone."

In turn, the Commission's Departmental Circular 776 was authorized and directed by Executive Order 10577, a copy of which is attached hereto as Exhibit "D", Section 201 (c) of which reads in pertinent part:

"(c) All employees in the competitive service who on the effective date of this order are serving under indefinite appointments made noncompetitively based upon prior service with a competitive status shall, as of the effective date of this order, have their appointments converted to career-conditional appointments if they have had less than three years of creditable service, and to career appointments if they have had three years or more of such service under either permanent or indefinite appointment."

Plaintiff qualified for the Conversion to Career Appointment in every respect required by Section 201 (c) of Executive Order 10577 quoted above. Thus, to determine that plaintiff was "in the competitive service" we need only look to the definition of that term contained in

Section S-2-11 of the Commission's Federal Personnel Manual, a copy of which is attached hereto as Exhibit "E", which says:

"The term 'competitive service' as applied to persons, includes those employees with competitive status who are serving under permanent or indefinite appointment in competitive positions. In this sense, the competitive service has the same meaning as the 'classified service', 'classified (competitive) service' or 'classified civil service' as defined in existing statutes (notably the Act of March 27, 1922) and Executive Orders."

Indeed, under this definition, plaintiff was not only in the competitive service but by the same token was a member of the "classified civil service" and, even lacking his career appointment, was therefore entitled to the protection of the procedural safeguards of the Lloyd-LaFollette Act.

Lest there be any argument that plaintiff occupied a "competitive position" as an employee of the Post Office Department, this question is likewise resolved in Section S-2-11 of the Commission's Federal Personnel Manual defining competitive service in terms of competitive positions, that is, civilian positions in the executive branch of the government.

The effective date of this Executive Order 10577 was January 23, 1955, the very date upon which the plaintiff's conversion to career appointment became effective. That he was then serving under an "indefinite appointment made non-competitively based upon prior service with a competitive status" all appears from Exhibits "A", "B", "C", and "D". The fact that the plaintiff at the time of his conversion had more than "three years of creditable service" is set forth in Item 21 of Exhibit "C". And, as pointed out above, "competitive service" is the equivalent of "classified civil service." Roth v. Brownell, 215 F.2d 500 (D. C. Cir. 1954).

It seems irrefutable then from the Commission's own records that at the time of his removal, and for a substantial period before-hand, plaintiff was a member of the "classified Civil Service" and within the purview of the Lloyd-LaFollette Act.

It is noteworthy that the appointments provided for under Sections 201 (a) and 201 (b) of Executive Order 10577, which do not apply to the plaintiff, were by their terms made subject to such conditions as the Commission may prescribe. Contrariwise, Section 201 (c) which does apply to the plaintiff is conspicuously absent of such Commission authority. It was but logical and fair play for the Executive in his wisdom to express Section 201 (c) as a mandate free of the implications of any conditions that the Commission might impose for it was to provide against any discrimination in favor of the new and against the old employees that the Executive had in mind. It cannot be gainsaid that the plaintiff was an old employee -- at the time of his removal he had approximately nineteen years of creditable service as a career employee.

2. Plaintiff Was Not Guilty of Laches.

In answer to the argument of the defendants that the plaintiff was guilty of laches, there is attached hereto as Exhibit "F" his affidavit demonstrating the reasons for the time intervals that elapsed between the respective dates of his suspension and removal and the dates that he sought his remedy before this Court.

Jones v. Summerfield, 265 F.2d 125 (D.C. Cir. 1959), cited by the defendants, is not applicable. There the plaintiff's contention that the delay was because of his reliance upon pending litigation was "unsupported by the pleadings or by affidavits". In the instant case the exhibits amply support the fact that the plaintiff at all times was engaged to the fullest extent that his health and conditions permitted in the prosecution of his rights. As stated by the Court in Ritter v. Strauss, 261 F.2d 767 (D.C. Cir. 1958):

"When, as in this case, a Government employee has been discharged in violation of his legal rights he should not be held to have forfeited those rights by lack of diligence unless there are strong equities which override those rights."

It seems plain that here there are no overriding equities. In an attempt to say that there are, the defendants would have the Court believe on one hand that "the Government could well be held liable for the amount of salary to which plaintiff would appear entitled to receive from the date of his removal - now over four years." On the other hand, where it more nearly fits different contentions that they make, the defendants say in effect that plaintiff's reinstatement would be meaningless or impossible of performance for the reason that he has been retired on a disability annuity since his removal and therefore unable to show that he was during the period involved able to perform his duties.

It seems under the circumstances a distortion of basic equitable principles to argue that the plaintiff is guilty of laches.

3. Plaintiff's Disability Retirement in No Way Affects
His Right to Reinstatement.

Plaintiff has not been retired, as the defendants say he has, on a disability annuity since the date of his removal complained of. He was suspended without pay from his position on August 25, 1955 (See Exhibit "G"); he was removed therefrom on October 7, 1955 (See Exhibit "A" to the Complaint); and his disability did not commence, nor was any annuity paid to him until as of November 1, 1955, and then for a disability which was connected with service prior to both his suspension and removal. (See Exhibit "F")

In any event, the defendants completely overlook the fact that the plaintiff was suspended without pay on August 25, 1955, a time when he was also a member of the "Classified Civil Service" and, therefore, under the express terms of the Lloyd-LaFollette Act, so that even assuming arguendo that the disability related back to October 7, 1955, there is still the period from August 25, 1955 to October 7, 1955 during which he was capable of useful and efficient service in the position occupied by him.

It follows that the grant to the plaintiff of the relief he seeks would hardly be meaningless. Assuming his reinstatement, he would be entitled:

- a. To back pay at least from August 25, 1955 to October 7, 1955, if not to November 1, 1955.
- b. To 539 hours of sick leave (See Exhibit "H" attached hereto) which had been accumulated by him during the course of his service and which would have been paid to him at the full rate prior to the commencing of his disability annuity which is at a much lower rate and which would have been made to coincide with the exhaustion of his sick leave.
- c. To reemployment rights at such time in the future as he would be found to be physically qualified for government service.

CONCLUSION

For the foregoing reasons it is respectfully submitted that plaintiff's Cross-Motion for Summary Judgment should be granted and defendants' Motion for Summary Judgment should be denied.

Respectfully submitted,

MEHLER, GOLDSBOROUGH & IVES

By: /s/ RICHARD A. MEHLER
 2121 K Street, N.W.
 Washington 7, D. C.
 Attorneys for Plaintiff

EXHIBIT "A"

UNITED STATES CIVIL SERVICE COMMISSION
SERVICE RECORD DIVISION
STATUS SECTION

WASHINGTON 25. D. C. June 21, 1954

Robert W. Hicks

In response to your inquiry regarding your civil service status your attention is invited to the paragraphs checked below:

☒ You have a competitive civil service status on the basis of probational appointment on 7-21-47 as patent examiner, P-2, \$3397.20 P.a., in Dept. of Commerce Pat. Office, D. C. You were transferred to Veterans Administration on 6-16-52.

☒ Date and nature of separation (from Veterans Administration) not of record in this office. You presented photostat copies of Form 50 showing resig. on 5-9-54.

☒ Last position, grade, salary Not of record in this office.

☒ Under the present regulations subject to applicable procedures (including whatever inquiry or investigation may be deemed necessary), you may be considered for:

- ☐ Transfer
- ☒ Indefinite Appointment
- ☐ Reemployment with permanent tenure for 1 year from the date of your RIF notice
- ☐ Temporary Renewable Appointment

to any position in the Federal service for which you can meet the requirements.

☐ Questions concerning your retention in your present position should be directed to your personnel officials.

Remarks: The records also show that you acquired competitive status in the War Department, Engineer Department at Large on 5-1-38. You served until 11-12-43 when you resigned as Assoc. Engineer (safety), P-3, \$3200 P.a.

Service Record Division

EXHIBIT "B"
POST OFFICE DEPARTMENT
BUREAU OF PERSONNEL
WASHINGTON, D. C.

STANDARD FORM 50
 REV. APRIL 1951
 PREPARED BY
 U. S. CIVIL SERVICE COMMISSION
 OFFICE OF PERSONNEL ADMINISTRATION

NOTIFICATION OF PERSONNEL ACTION

1. NAME (MR - MISS - MRS - ONE GIVEN NAME, INITIAL(S), AND SURNAME) Mr. Robert W. Hicks	2. DATE OF BIRTH 10/24/04	3. JOURNAL OR ACTION NO. 10/25/54	4. DATE
---	-------------------------------------	---	---------

This is to notify you of the following action affecting your employment:

5. NATURE OF ACTION (USE STANDARD TERMINOLOGY) Indefinite Appointment (in lieu of reinstatement)	6. EFFECTIVE DATE 10/25/54	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY CSR 7.105(a)(1)
--	--------------------------------------	---

8. POSITION TITLE Engineering Draftsman (Mechanical) EB-2201		9. SERVICE, SENIORITY, GRADE, SALARY GS-818-7, \$4,205 per annum	
10. ORGANIZATIONAL DESIGNATIONS Bureau of Facilities Division of Real Estate Design Engineering Section Washington, D. C.		11. REASON FOR ACTION Washington, D. C.	
12. FIELD OR DEPT. ☒ FIELD ☐ DEPARTMENTAL		13. FIELD OR DEPT. ☐ FIELD ☒ DEPARTMENTAL	
14. POSITION CLASSIFICATION ACTION NEW ☐ VICE ☐ L. A. ☐ REAL ☐		15. DATE OF APPOINTMENT (ACCESSIONS ONLY) 10/25/54	
16. DATE OF APPOINTMENT (ACCESSIONS ONLY) 10/25/54		17. LEGAL RESIDENCE ☒ CLAIMED ☐ PROVED STATE: CONN.	

18. REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements. The classification grade of this position is subject to post-audit and correction by the Post Office Department or Civil Service Commission.

Subject to satisfactory medical and chest X-ray examinations.
 Probationary period completed.
 Acquired status by probational appointment on 7/21/47, as Patent Examiner, P-2, \$3,397.20 per annum, Department of Commerce, Patent Office, Washington, D. C. and subsequent service.
 Formerly served as Mechanical Engineer, GS-9, \$5,310 per annum, Veterans Administration, Washington, D. C.

Bernard J. Beary
 Bernard J. Beary

Director

Departmental Personnel Division
 22. SIGNATURE OR OTHER AUTHENTICATION

ENTRANCE PERFORMANCE RATING: **Satisfactory**
 RRP

1. EMPLOYEE COPY

EXHIBIT "C"
ST OFFICE DEPARTMENT
BUREAU OF PERSONNEL
WASHINGTON, D. C.

STANDARD FORM 50
 REV. APRIL 1951
 PROMULGATED BY
 U. S. CIVIL SERVICE COMMISSION
 CHAPTER XI, FEDERAL PERSONNEL MANUAL

NOTIFICATION OF PERSONNEL ACTION

1. NAME (MR.-MRS.-ONE GIVEN NAME, INITIAL(S), AND SURNAME) Mr. Robert W. Hicks	2. DATE OF BIRTH 10-24-04	3. JOURNAL OR ACTION NO.	4. DATE 1-20-55
--	-------------------------------------	--------------------------	---------------------------

This is to notify you of the following action affecting your employment:

5. NATURE OF ACTION (USE STANDARD TERMINOLOGY) Conversion to Career Appointment	6. EFFECTIVE DATE 1-23-55	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY DC 776
---	-------------------------------------	--

FROM

TO

8. POSITION TITLE Engineering Draftsman (Mechanical) EB-2204 GS-618-7, \$4,205 per annum		9. SERVICE, SENIORITY, GRADE, SALARY		10. ORGANIZATIONAL DESIGNATIONS Bureau of Facilities Division of Real Estate Design Engineering Section Washington, D. C.	
11. HEADQUARTERS		12. FIELD OR DEPT. ☐ FIELD ☒ DEPARTMENTAL			
13. VETERAN'S PREFERENCE NONE OTHER 5-PT. 10-POINT		Subject to FICA (Yes-No) No			
14. SEX M	15. RACE M	17. APPROPRIATION FROM: General Administration TO:		14. POSITION CLASSIFICATION ACTION NEW VICE L. A. REAL.	
16. REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements. The classification grade of this position is subject to post-audit and correction by the Post Office Department or Civil Service Commission. Appointed 10-25-54 under CSR 7.105(a)(1). Substantially continuous creditable service from 7-21-47 to 5-9-54. Subject to members of family requirement.		18. SUBJECT TO C. S. RETIREMENT ACT (YES-NO) Yes		19. DATE OF APPOINTMENT AFFIDAVIT (ACCESSIONS ONLY)	
		20. LEGAL RESIDENCE ☒ CLAIMED ☐ PROVED STATE: Conn.			

ENTRANCE PERFORMANCE RATING:

17.

Bernard J. Beary,
 Director
 Departmental Personnel Division
 22 SIGNATURE OR OTHER AUTHENTICATION

1. EMPLOYEE COPY

U. S. GOVERNMENT PRINTING OFFICE: 1954-500000

30
EXHIBIT "D"

Z1-207

Executive Order 10577

Amending the Civil Service Rules and Authorizing a New
Appointment System for the Competitive Service

By virtue of the authority vested in me by the Constitution, by section 1753 of the Revised Statutes (5 U. S. C. 631), by the Civil Service Act of January 16, 1883 (22 Stat. 403), by section 301 of title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

PART I—CIVIL SERVICE RULES

NOTE: The civil service rules which were issued as Part I of this order are printed in Chapter Z1, beginning on page Z1-211.

PART II—SPECIAL PROVISIONS FOR
TRANSITION FROM INDEFINITE
APPOINTMENT SYSTEM TO CAREER-
CONDITIONAL APPOINTMENT SYSTEM

Sec. 201 (a) Under such conditions as the Civil Service Commission may prescribe, all employees serving under indefinite appointments in the competitive service on the effective date of this order who were appointed by selection in regular order from appropriate competitive civil-service registers established subsequent to February 4, 1946, shall, as of the effective date of this order, have their appointments converted to career-conditional appointments if they have had less than three years of creditable service, and to career appointments if they have had three or more years of such service since they were appointed: *Provided*, That any such employees who left their positions prior to the effective date of this order to enter the armed forces of the United States and are reemployed in the competitive service after the effective date of this order pursuant to application for employment made within ninety

days after honorable discharge, or after hospitalization continuing after discharge for not more than one year, shall have their former indefinite appointments converted to career-conditional or career appointments in accordance with this section; *Provided further*, That employees serving in excepted positions who would meet the conditions for career-conditional or career appointments if they were serving in competitive positions shall be granted competitive status upon completion of a probationary period.

(b) The Commission may prescribe the conditions under which employees who are serving under indefinite appointments in the competitive service on the effective date of this order and who were not appointed by selection in regular order from competitive civil-service registers, may be examined and have their names entered on existing competitive civil-service registers. When such employees are within reach for appointment from such registers they shall be eligible for career-conditional appointments if, since they were given indefinite appointments, they have had less than three years of creditable service, and for career appointments if they have had three or more years of such service.

(c) All employees in the competitive service who on the effective date of this order are serving under indefinite appointments made noncompetitively based upon prior service with a competitive status shall, as of the effective date of this order, have their appointments converted to career-conditional appointments if they have had less than three years of creditable service, and to career appointments if they have had

31
EXHIBIT "D" (Cont'd.)

Z1-208 CHAPTER Z1. LAWS, RULES, AND REGULATIONS: *Executive Order 10577*

three or more years of such service under either permanent or indefinite appointment: *Provided*, That any such employees who left their positions prior to the effective date of this order to enter the armed forces of the United States and are reemployed in the competitive service after the effective date of this order pursuant to application for employment made within ninety days after honorable discharge, or after hospitalization continuing after discharge for not more than one year, shall have their former indefinite appointments converted to career-conditional or career appointments in accordance with this section: *Provided further*, That any such employees in the field service of the Post Office Department whose salary rates are fixed by the Act of July 6, 1945, 59 Stat. 435, as heretofore or hereafter amended and supplemented, shall have their appointments converted to career appointments if they are serving in positions in the authorized complement of permanent positions (consisting of regular positions and positions within the authorized quota of substitutes).

(d) The Commission shall define "creditable service" and shall prescribe the conditions for completion of the period of creditable service required for career appointment.

(e) Except as provided in section 201 (c) hereof, this section shall not apply to employees serving under indefinite appointments in the field service of the Post Office Department whose salary rates are fixed by the Act of July 6, 1945, 59 Stat. 435, as heretofore or hereafter amended and supplemented.

SEC. 202 (a) Notwithstanding the provisions of section 201 (a) of this order, and subject to such noncompetitive examination or other requirements as the Commission may prescribe, any employee entitled to veteran preference who has a compensable service-connected disability of ten per centum or more may, upon recommendation of the agency concerned, noncompetitively acquire a competitive status subject to completion of a probationary period: *Provided*, That he is serving under an indefinite appointment, a temporary appointment pending establishment of a register, or a temporary appointment for job employment which has

been continuous for more than one year: *Provided further*, That recommendation for acquisition of status under this section is made not later than December 31, 1957.

(b) Any employee who is recommended for noncompetitive acquisition of competitive status under Section 202 (a) hereof and who satisfies the noncompetitive examination and other requirements of the Commission shall have the appointment under which he is serving converted to a career appointment if he has completed a probationary period or to a career-conditional appointment if he has not completed a probationary period. The career-conditional appointment of such an employee shall be converted to a career appointment upon completion of probation.

(c) An employee in the field service of the Post Office Department whose salary rate is fixed by the Act of July 6, 1945, 59 Stat. 435, as heretofore or hereafter amended and supplemented, may not be recommended for competitive status under Section 202 (a) hereof unless he can be appointed to a vacancy in the authorized complement of permanent positions (consisting of regular positions and positions within the authorized quota of substitutes). When such an employee is recommended for noncompetitive acquisition of competitive status and satisfies the noncompetitive examination and other requirements of the Commission, his appointment shall be converted to a career appointment subject to satisfactory completion of a probationary period.

SEC. 203¹ The career-conditional appointment of any employee entitled to veteran preference who has a compensable service-connected disability of ten per centum or more may be converted to a career appointment: *Provided*, That he receives his career-conditional appointment prior to January 1, 1958, and that, not later than December 31, 1958, the agency in which he is employed recommends such conversion and certifies to the Commission that he has satisfactorily completed a one-year proba-

¹ Amended August 23, 1956, effective January 23, 1955, the effective date of Executive Order No. 10577, by Executive Order 10675, and further amended December 12, 1957 by Executive Order 10745.

EXHIBIT "D" (Cont'd.)

CHAPTER Z1. LAWS, RULES, AND REGULATIONS: *Executive Order 10577* Z1-209

tionary period: *Provided further*, That any such employee who is not certified for career appointment under this section shall have his career-conditional appointment converted to a career appointment when he has completed the service requirement for such appointment prescribed under section 2.2 (s) of Civil Service Rule II. ★

Sec. 204 In order to effectuate the purposes of Section 1310 of the Supplemental Appropriations Act, 1952 (65 Stat. 757), as amended, the Commission shall, after consultation with the agencies concerned, determine the division of allowable permanent appointments within and between the excepted service and the competitive service.

Sec. 205 The Commission shall issue such regulations and instructions as may be necessary to effectuate the purposes of this part.

PART III

Sec. 301 The following-described executive orders and parts of executive orders are hereby revoked:

Part II of Executive Order No. 9830 of

February 24, 1947, amending the Civil Service Rules: *Provided*, That the positions listed in Schedules A, B, and C, as provided for in Civil Service Rule VI of that order, as amended, shall be considered as being listed in Schedules A, B, and C, respectively, as provided for in Civil Service Rule VI of this order, unless and until they are removed therefrom by the Commission.

Executive Orders No. 9973 of June 28, 1948, No. 10440 of March 31, 1953, and No. 10463 of June 25, 1953, amending Civil Service Rule VI.

Executive Order No. 10180 of November 13, 1950, Establishing Special Personnel Procedures in the Interest of National Defense.

PART IV

Sec. 401 This order shall become effective on the first Sunday after the sixtieth day after the date hereof.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE,
November 22, 1954.

33
EXHIBIT "E"

Determining Status of Persons

MEANING AND EFFECT OF COMPETITIVE STATUS OR ELIGIBILITY THEREFOR

Competitive status or eligibility for competitive status means basic eligibility to be noncompetitively selected to fill a vacancy in a competitive position. A person with a competitive status may be promoted, transferred, reassigned, reinstated, or demoted without taking an open competitive examination, subject to the conditions prescribed by the civil service rules and regulations.

HOW ACQUIRED

A competitive status is acquired by career-conditional (or career) appointment through open competitive examination upon satisfactory completion of a probationary period. It may also be granted by statute, Executive order, or the Civil Service rules without competitive examination. (In the past, competitive status was also acquired by probational appointment through competitive examination, subject to the satisfactory completion of a probationary period.)

An employee or former employee is referred to as having "eligibility for competitive status" when the probationary period, following a career or career-conditional appointment, has not been completed. An employee or former employee having eligibility for competitive status may be noncompetitively selected to fill a vacancy in a competitive position, subject to any restrictions governing the specific noncompetitive action.

The principal Executive orders and provisions of the civil service rules and regulations that authorize the acquisition of a competitive status without competitive examination are described in Chapter C4.

RELATIONSHIP BETWEEN COMPETITIVE STATUS AND THE COMPETITIVE SERVICE

In the preceding section, the competitive service was defined in terms of competitive positions, that is, civilian positions in the executive branch unless excepted by or pursuant to statute, Executive order, or by the Commission under Civil Service Rule VI, and positions in the legislative and judicial branches of the Federal Government and in the Government of the District of Columbia which are specifically made subject to the civil-service laws by statute.

The term "competitive service" as applied to persons, includes those employees with competitive status who are serving under permanent or indefinite appointment in competitive positions. In this sense, the competitive service has the same meaning as the "classified service", "classified (competitive) service" or "classified civil service" as defined in existing statutes (notably the Act of March 27, 1922) and Executive orders.

Under the heading "Effect of Status of Incumbent on Status of Position" in the preceding section of this chapter, there are listed the situations where a position excepted under Schedule A, B, or C remains in the competitive service during the incumbency of a specific class of employee with competitive status, and where the incumbent is considered as being in the competitive service, as the term is applied to persons. Except as provided in the section on "Determining Status of Positions" employees with competitive status serving in excepted positions are not in the competitive service. For example, persons with competitive status serving in competitive positions at the time such positions are placed in the excepted service by Act of Congress are not serving in positions

EXHIBIT "G"
POST OFFICE DEPARTMENT
BUREAU OF PERSONNEL
WASHINGTON, D. C.

STANDARD FORM 50
 REV. APRIL 1971
 PREPARED BY
 U. S. CIVIL SERVICE COMMISSION
 OFFICE OF PERSONNEL SERVICE

NOTIFICATION OF PERSONNEL ACTION

1. NAME (LAST, FIRST, MIDDLE, AND SURNAMES)		2. DATE OF BIRTH		3. JOURNAL OR ACTION NO.		4. DATE	
Mr. Robert W. Hicks		10-14-04				891456	
This is to notify you of the following action affecting your employment:							
5. NATURE OF ACTION (SEE STANDARD TERMINOLOGY)		6. EFFECTIVE DATE		7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY			
Suspension for an Indefinite Period*		8-25-55		CSC Letter dated 8-9-55 CSC Central Office-Ser.No.16.55			
FROM				TO 11860			
8. POSITION TITLE		9. SERVICE, SERIES, GRADE, SALARY		10. ORGANIZATIONAL DESIGNATIONS			
Engineering Draftsman (Mechanical) EB-2204		GS-818-7, \$4525 per annum		Bureau of Facilities Division of Real Estate Design Engineering Section Washington, D. C.			
11. HEADQUARTERS		12. FIELD OR DEPT.		13. FIELD		14. DEPARTMENTAL	
15. VETERAN'S PREFERENCE		16. DEPARTMENTAL (Yes-No)		17. POSITION CLASSIFICATION ACTION		18. FIELD	
NONE OTHER 1-PT. NO POINT OTHER		Subject to FICA (Yes-No) No		NEW VICE L. A. REAL		19. DATE OF APPOINTMENT AFFIDAVIT (ACTION ONLY)	
X							
19. REMARKS		20. APPROPRIATION		21. SUBJECT TO C. 1. RETIREMENT ACT (YES-NO)		22. DATE OF APPOINTMENT AFFIDAVIT (ACTION ONLY)	
This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements. The classification grade of this position is subject to post-audit and correction by the Post Office Department or Civil Service Commission.		General Administration		Yes			
* From duty and pay.							
Instructed by Civil Service Commission to suspend pending adjudication of appeal of removal because of failure to meet suitability standards for Federal employment.							
W. W. Campbell For Director Departmental Personnel Division							
23. SIGNATURE OF OTHER AUTHORITY							

EXHIBIT "H"

POST OFFICE DEPARTMENT

Division of:
Accounting

Bureau of Finance
Washington 25, D. C.

In Reply Refer to:
AEU:CC:R

January 30, 1957

Mr. Richard A. Mehler
Suite 401, Nada Building
2000 K Street, N. W.
Washington 6, D. C.

Dear Mr. Mehler:

Reference is made to your letter dated January 15, 1957 requesting the sick leave balance for Mr. Robert W. Hicks.

Mr. Hicks had 539 hours' sick leave to his credit at the time of his separation from the Post Office Department.

Sincerely yours,

/s/ J. M. Gallagher

for

J. Earle Weatherly

Director, Division of Accounting

[Filed February 8, 1960]

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff's principal contentions have largely been disposed of in defendants' memorandum of points and authorities supporting their previously filed Motion for Summary Judgment. The discussion that follows, therefore, is necessarily abbreviated and is submitted chiefly for the purpose of facilitating oral argument herein.

I.

Plaintiff is Physically Disqualified For Reinstatement

Plaintiff's affidavit and the arguments in his Cross-Motion for Summary Judgment merely substantiate the showing made by defendants in

their motion, affidavit, and memorandum that his unfortunate physical incapacitation does not permit reinstatement to the position last held. As expressly conceded by plaintiff, the physical disability for which he has been receiving a pension (for the period of November 1, 1955 to the present) "was connected with service prior to both his suspension and removal" earlier in 1955 (plaintiff's affidavit, at page 3, and his memorandum of points and authorities, at page 6).

Since plaintiff is still receiving a disability pension by reason of physical incapacitation arising out of the position last held, he may not successfully contend that he is physically qualified to perform the duties of that position. Plaintiff's present physical unfitness alone renders him unsuitable for reinstatement to such position by reason of the regulations of the Civil Service Commission proscribing appointments where there exists, as here, "any legal or other disqualification which makes the applicant unfit for the service" 5 CFR, 1956 Supp., § 2.106(a)(8). This complies with the statutory mandate that persons may not be appointed to positions the duties of which they are physically or otherwise incapable of performing. 5 U.S.C. § 633 (2)(9) ^{1/}

II.

Since Plaintiff Has Not Excused His Failure to Prosecute This Matter Diligently, Laches Bars The Complaint

By the affidavit accompanying plaintiff's cross-motion, he unconvincingly seeks to excuse his lack of diligence in prosecuting this matter

^{1/} Although this suit is essentially one for reinstatement, plaintiff in his motion now seeks to litigate a claim of back pay and disability benefits prior to November 1, 1955. These matters are clearly barred from consideration by this Court. 28 U.S.C. § 1346. But, even if such claims may be litigated in this action (instead of in an action instituted in the Court of Claims), it is submitted that the administrative record shows plaintiff to have received all monetary benefits to which he was entitled. Plaintiff was removed in October 1955 and his payments under his disability pension were made retroactive to November 1, 1955, the first day of the month following his removal, as provided by law. 70 Stat. 785, 5 USC § 2264(b), 5 CFR § 29.7. But, before any Court may litigate this issue, plaintiff must first seek and exhaust his administrative remedies before the Commission. As yet, he has failed to do so.

by reason of his unfortunate physical disability.

The same counsel who represented plaintiff in the administrative proceedings below represented him in the prior action (CA No. 4031-56), as he does in this (the second) suit which involves the same subject matter. Yet, the complaint in the first action was filed on behalf of plaintiff by such counsel some twelve months^{2/} (almost to the day) following the former's removal, which had been sustained by the final administrative action of the Commission's Board of Appeals and Review, dated September 28, 1955, discussed in defendants' prior memorandum herein, at pages 3, 4 - 5. (The period of laches, as pointed out in such memorandum, actually commences from the date of such administrative action, rather than the date of actual removal.)

It seems patent from the aforesaid affidavit and the record in this case that plaintiff's unfortunate disability had no substantial effect on his failure to exercise through his counsel, if not personally, the diligence long required of one seeking reinstatement to a Government position. Additionally, plaintiff makes no effort whatsoever to excuse the further lack of diligence manifested by his failure in the first suit to substitute parties under Rule 25 (d) of the Federal Rules of Civil Procedure within the six-month period thereby permitted. His failure to act promptly thus lead to the filing of this second suit which otherwise would have been entirely unnecessary.

Thus, even if that portion of the time plaintiff was in the hospital or under close medical attention may excuse some of his lack of diligence, the total remaining time period of his failure to act diligently, either personally or (as he has chosen) through his present counsel, remains substantial. As noted in our prior memorandum, the prejudice to the Government by so failing to act diligently is obvious and requires the application of laches herein.

² Not ten months, as erroneously stated at page 5 of defendants' prior memorandum of points and authorities supporting their Motion for Summary Judgment herein.

Plaintiff's Removal for Unsuitability Was Proper

Plaintiff's contentions as to a violation of procedures in effecting his removal or suitability grounds is predicated upon an erroneous assumption (denied in defendants' answer) that his rights were governed by the Lloyd-LaFollette Act, 5 U.S.C. §652.

As noted in the defendants' supporting memorandum to their pending motion (at page 1), plaintiff, a non-veteran, properly received an Indefinite Appointment [in lieu of Reinstatement, under Civil Service Regulation 7.105(a)(1)]^{3/} notwithstanding his competitive status. The nature of his appointment, rather than the fact of his status, governs the conditions of his employment.^{4/} It follows, therefore, that plaintiff's appointment was subject to investigation during an eighteen-month period pursuant to 5 CFR, 1953 Supp., §2.112, which is quoted in defendants' memorandum at page 8.

Such investigative period was in effect upon the promulgation of Executive Order 10577, on November 22, 1954, and the conversion thereunder of plaintiff's Indefinite Appointment to a Career Appointment on January 23, 1955. Significantly, such Executive Order did not abrogate any existing requirements of the Commission respecting suitability, but specifically provided, in Section 205 thereof, that

"The Commission shall issue such regulations and instructions as may be necessary to effectuate the purposes of this part."

In implementation of this Executive Order, the Commission issued new regulations relative to the filling of competitive positions that were effective on the same date as such Executive Order. See 19 F.R. 8608, dated December 16, 1954, setting forth the provisions relating to appointments subject to investigation found at 5 CFR, 1954 Supp., §2.107(a), which provides:

^{3/} Set forth at 5 CFR, 1953 Supp., §7.105(a)(1).

^{4/} This is plain from plaintiff's Exhibit E. See also 5 C.F.R., 1954 Supp., §1.102(g).

"All types of appointments under the regulations in this chapter, except promotions, demotions, reassignments, and conversions from career-conditional to career appointment, shall be subject to investigation by the Commission to establish the appointee's qualifications and suitability for employment in the competitive service."

Patently, the conversion of plaintiff's Indefinite Appointment to a Career Appointment does not fall within the exceptions specified in 5 CFR, 1954 Supp., §2.107 (a) and thus was one of the types still subject to investigation for suitability.

By virtue of such conversion, plaintiff's new appointment was subject to another eighteen-month period of investigation for suitability under 5 CFR, 1954 Supp., §2.107 (c), which provides:

"For a period of eighteen (18) months after the effective date of an appointment subject to investigation under paragraph (a) of this section, the Commission may instruct the agency to remove the employee if investigation discloses that he is disqualified for any of the reasons listed in §2.106. Thereafter, the Commission may require removal only on the basis of intentional false statements or deception or fraud in examination or appointment."

If this were not so, ^{5/} plaintiff's position would not be substantially improved because he would still remain subject to investigation for suitability during the original eighteen-month period which had not expired upon the date of his removal.

^{5/} Cf., 5 CFR, 1954 Supp., §2.107 (d) which provides: "Appointments are made subject to investigation to continue the Commission's jurisdiction to investigate the qualifications and suitability of an applicant after appointment and to require removal when it finds an employee is disqualified for Federal employment. The condition 'subject to investigation' shall not be construed as requiring any employee to serve a new probationary or trial period or as extending the probationary or trial period of any employee." The "probationary or trial period" referred to therein pertains solely to the twelve-month period in which the employing agency could determine a new employee's ability to perform his duties, rather than the 18-month investigative period in which the Civil Service Commission (not the employing agency) could determine his suitability for employment under 5 CFR, 1954 Supp., §2.106, as quoted in defendants' memorandum.

The Commission's investigation as to suitability has long been considered as an important part of its examining process. Accordingly, Executive Order 10577 may not be so narrowly construed as reflecting an intention of the Executive Branch to abrogate the duty of the Government to employ only those persons who are found, following the Commission's investigation, to meet the long existing standards of suitability for employment.

Conclusion

Wherefore, it is respectfully submitted that plaintiff's Cross Motion for Summary Judgment be denied and the complaint dismissed.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ John F. Doyle
Assistant United States Attorney

/s/ Harold D. Rhynedance, Jr.
Assistant United States Attorney

Of Counsel:
Marion W. Hazel
Attorney, Office of the General Counsel
Civil Service Commission

[Certificate of Service]

[Filed March 2, 1960]

PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT IN
SUPPORT OF HIS CROSS MOTION AND IN OP-
POSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

ROBERT W. HICKS, being first duly sworn, deposes and says:

1. That he is attaching hereto photocopies of two letters directed to the Civil Service Commission, one dated March 15, 1956 over the

signature of Adolph Friedman, M.D. and the other dated March 13, 1956 over the signature of Paul F. Holland, M.D.

2. That the said photocopies are true copies of the original letters and were furnished to affiant for filing with the Federal Employees Compensation Bureau.

3. That as the said letters reveal, affiant has since at least January, 1956 been suffering from, among other things, a serious heart condition which has, together with his other ailments, made it extremely difficult and at times impossible for him to pursue his business and affairs.

/s/ ROBERT W. HICKS

[Jurat dated March 2, 1960]
[Certificate of Service]

ADOLPH FRIEDMAN, M. D.
Farragut Medical Building
509 Seventeenth Street, N. W.
Washington 6, D. C.

District 5670

March 15, 1956

Civil Service Commission
Retirement Division
Washington 25, D. C.

Re: Mr. Robert Hicks
1809 H Street, N.W.
Washington, D. C.

Gentlemen:

I first saw Mr. Hicks on March 26, 1955 at which time he discussed with me his exposure to atomic radiation in February 1950. The most apparent residuum of this, is the bluish gray dusky pigmentation of his skin. He was referred to the National Institute of Health for a complete medical evaluation. Somehow or other he was finally hospitalized in the U.S. Marine Hospital. During this interval he developed episodes of paroxysmal auricular tachycardia. He was treated with quinidine and digetalis.

He returned to my office on February 15, 1956, at which time he discussed with me the above hospitalization. However, despite the treatment, he continued to have recurrences of the episodes of tachycardia. Several times at night, the episodes were so severe he had to enter Emergency Hospital, Washington, D.C., for treatment. On such occasions the episodes lasted 4 or 5 hours or longer at which time he developed cerebral anoxia and had convulsive movements.

Although I have attempted to alter his medication by adding Pronestyl he has had only slight improvement.

It is my opinion that Mr. Hicks should have further cardiac evaluation, preferably in a local hospital. Vagal blocks should be attempted, first chemically then by local anesthetics, if necessary. He also has a questionable back injury, which has never been fully evaluated, and which may aggravate his present problem. This too should be worked up.

Hoping you will review this patient's application favorably, I am

Very truly yours,

/s/ Adolph Friedman, M.D.

PAUL FLEMING HOLLAND, M. D.
1619 G Street, N. W.
Washington 6, D. C.

Metropolitan 6-5630

March 13, 1956

U.S. Civil Service Commission
Retirement Division
Washington 25, D. C.

Re: Mr. Robert Hicks
1809 H Street, N.W.

Mr. Hicks has been under my care and treatment since January 25, 1956 suffering from paroxysmal tachycardia, which required digitalization, ulcer of left cornea, ulcer great toe left foot and ulcer index finger left hand. This condition could have been caused from excessive radiation.

It is impossible for Mr. Hicks to be up and around for more than 4-5 hours a day due to constant fatigue and if the patient becomes too tired there is danger of aggravation of the paroxysmal tachycardia.

Very truly yours,

/s/ PAUL F. HOLLAND, M.D.

[Filed June 28, 1960]

ORDER

This cause having come on to be heard on cross-motion for summary judgment, after oral argument and careful consideration of the record, it is by the Court this 28th day of June, 1960,

ORDERED That the motion of the plaintiff be and the same is hereby denied, and it is

FURTHER ORDERED That the motion of the defendants be and the same is hereby granted.

/s/ LUTHER YOUNGDAHL
Judge

[Filed July 26, 1960]

NOTICE OF APPEAL

Notice is hereby given this 26th day of July, 1960, that ROBERT W. HICKS, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 28th day of June, 1960 in favor of Defendants against said ROBERT W. HICKS, Plaintiff.

MEHLER, GOLDSBOROUGH & IVES

/s/ Richard A. Mehler
Attorney for Plaintiff
NADA Building
2000 K Street, N.W.
Washington 6, D. C.

Mail copy to:
Harold D. Rhynedance, Jr., Esq.
Asst. United States Attorney
United States Court House
Washington, D. C.

No. 15,979

FILED DEC 19 1950

*United States Court of Appeals
For the
District of Columbia Circuit*

IN THE

United States Court of Appeals

CLERK

Joseph W. Stewart

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT W. HICKS, APPELLANT

v.

ROBERT F. KENNEDY ET AL., APPELLEES

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

GEORGE COCHRAN DOUB,
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QUESTIONS PRESENTED

In the opinion of the appellees, the questions presented are:

1. Whether appellant's action for reinstatement is moot in that he is now physically disabled to perform the duties attendant to the position with the Post Office from which he was discharged.
2. Whether appellant's suit is barred by laches when over three years and seven months elapsed between the final administrative action and the commencement of this suit for reinstatement.
3. Whether a Government employee who has received an appointment subject to investigation may be removed without complying with the procedures set forth in the Lloyd-La Follette Act when investigation discloses information which shows that individual is not qualified for federal service.



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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 15,979

ROBERT W. HICKS, APPELLANT

v.

—
ARTHUR E. SUMMERFIELD, ET AL., APPELLEES

—
On Appeal from the United States District Court
for the District of Columbia

—
BRIEF FOR APPELLEES
—

COUNTERSTATEMENT OF THE CASE

This is an appeal by Robert W. Hicks, plaintiff below, from an order of the district court dismissing his suit for reinstatement to federal employment. Named as defendants are Arthur E. Summerfield, individually and as Postmaster General, and Roger W. Jones, Frederick J. Lawton and Barbara Bates Gunderson, individually and as Commissioners of the United States Civil Service Commission.

On October 25, 1954, appellant, received an "Indefinite Appointment (in lieu of reinstatement)" pursuant to Civil Service Regulation 7.105(a)(1) as an Engineering Draftsman (mechanical) with the Post Office Department, Bu-

reau of Facilities. This appointment was made subject to investigation and a period of probation (J.A. 28).¹ On August 9, 1955, the Civil Service Commission, after giving him full and complete opportunity to explain certain derogatory information disclosed by the investigation, instructed the Post Office Department to separate appellant (J.A. 9-10). Accordingly, appellant was suspended without pay effective August 25, 1955 (J.A. 34). This decision was appealed to the Civil Service Commission Board of Appeals (J.A. 11-12), which on September 28, 1955 affirmed on the grounds that "the nature of the offenses leading up to the issuance of charges against [appellant] by the Veterans Administration and evidence of difficulties in previous government employments" indicated that he was unsuitable for government service (J.A. 13-14).² Thereafter, on October 7, 1955, appellant was notified of his removal from service with the Post Office (J.A. 5).

On March 30, 1956, appellant, pursuant to 5 U.S.C. 710 (1952 ed.)³ executed an application for a disability annuity. (J.A. 7-8). The Civil Service Commission determined that he was totally disabled for useful and efficient service in his position, and accordingly granted him an annuity of \$128.00 per month retroactively from November 1, 1955 (App. 15-16). This annuity was later increased to \$141.00 pursuant to Public Law 85-465, and appellant has been paid this annuity continuously to date (J.A. 7-8; App. 16).

On October 5, 1956 (nearly twelve months after the decision of the Board of Appeals of the Civil Service Commission) the appellant filed suit in the district court seeking judicial review of the actions of the Commission and

¹ "J.A." citations refer to the appendix to appellant's brief. "App." citations refer to the Appendix to this brief.

² Appellant had previously been employed by the Veterans' Administration, the Department of Commerce, Patent Office (J.A. 28), and the War Department (J.A. 27).

³ Now, 5 U.S.C. 2257(d).

praying for a judgment declaring that he was entitled to be restored to his position with the Post Office. The defendants, on February 7, 1958, moved to dismiss on the grounds that appellant had failed to substitute two indispensable parties.⁴ This motion was granted by the district court on March 19, 1958. The judgment of dismissal was affirmed by this Court (*Hicks v. Summerfield*, 104 App.D.C. 286, 261 F. 2d 752 (C.A.D.C.)) and petition for a writ of certiorari was denied on April 6, 1959, 354 U.S. 959.

Appellant, on May 22, 1959, filed his complaint in the present action seeking reinstatement to his position with the Post Office. Appellees answered asserting five defenses: (1) that the complaint did not state a cause of action; (2) that appellant had not been a member of the "Classified Civil Service"; (3) that the complaint was barred by laches; (4) that the procedure followed by the Post Office and the Civil Service Commission was proper; and (5) that the suit was moot in that appellant had retired from Government service because of his total disability (J.A. 6). Thereafter, on October 21, 1959, the appellees filed a motion for summary judgment, relying principally upon the defense of mootness (J.A. 7-8), and on February 1, 1960, appellant filed a cross motion for summary judgment. The court below denied the motion of appellant, and granted that of appellees (J.A. 43).

EXECUTIVE ORDER AND REGULATIONS INVOLVED

1. Civil Service Regulation 7.105(a)(1), 5 C.F.R. (1954 Supp.) 7.105(a)(1), 17 F.R. 341, provides in pertinent part:

§ 7.105 Agency authority and General requirements for noncompetitive indefinite appointments. (a) After

⁴ Some of the defendants named by appellant in that suit had resigned from the Civil Service Commission during the interim between the filing of the complaint and the filing of the motion of defendants. Appellant never substituted the successors of the named defendants.

September 1, 1950, the employment noncompetitively of former Federal employees, and of indefinite employees of other agencies, shall be by indefinite appointment. The Commission hereby delegates authority to agencies to make such indefinite appointments subject to the following conditions:

(1) Any former Federal employee having a competitive status may be appointed in any agency.

2. Civil Service Regulation 2.112, 5 C.F.R. (1954 Supp.) 2.112, 15 F.R. 7747, provides in pertinent part:

Appointments may be subject to investigation. (a) The following types of appointments shall be made subject to investigation:

• • •

(7) Indefinite appointments under Parts 2, 7 and 8 of this chapter.

3. Executive Order No. 10577, Civil Service Rules, 5 U.S.C. 631 Note, (effective January 23, 1955), provides in pertinent parts:

§ 1.3. Definitions

As used in these Rules:

(a) "Competitive service" shall have the same meaning as the words "classified service", or "classified (competitive) service", or "classified civil service" as defined in existing statutes and executive orders.

(b) "Competitive position" shall mean a position in the competitive service.

(c) "Competitive status" shall mean basic eligibility to be noncompetitively selected to fill a vacancy in a competitive position.

§ 5.2. Authority of the Commission to make investigations

The Commission may make appropriate investigations to secure enforcement of the Civil Service Act, Rules, and Regulations, including investigation of the qualifications and suitability of applicants for positions in the competitive service. It may require appointments to be made subject to investigation to enable the Commission to determine, after appoint-

ment, that the requirements of law or the Civil Service Rules and Regulations have been met. Whenever the Commission finds that an employee serving under such an appointment is disqualified for Federal employment, it may instruct the agency to remove him, or to suspend him pending an appeal from the Commission's finding: *Provided*, That when an agency removes or suspends an employee pursuant to the Commission's instructions, and the Commission, on the basis of new evidence or on appeal, subsequently reverses the initial decision as to the employee's qualifications and suitability, the agency shall, upon request of the Commission, restore the employee to duty.

PAR II—SPECIAL PROVISIONS FOR TRANSITION FROM
INDEFINITE APPOINTMENT SYSTEM TO CAREER-CONDI-
TIONAL APPOINTMENT SYSTEM

§ 201

• • • • •

(c) All employees in the competitive service who on the effective date of this order are serving under indefinite appointments made noncompetitively based upon prior service with a competitive status shall, as of the effective date of this order, have their appointment converted to career-conditional appointments if they have had less than three years of creditable service and to career appointments if they have had three or more years of such service under either permanent or indefinite appointment:

SUMMARY OF ARGUMENT

1. The case is moot. This is a suit by a discharged Government employee to compel restoration to his former position with the Post Office. Since his removal, however, the employee has been found by the Civil Service Commission to be totally disabled for useful and efficient service in his or a comparable position with the Government. On the basis of his disability he has been granted an annuity and is being paid disability benefits by the Government. Since he admittedly is no longer capable of

performing the duties attendant to the position from which he was removed, his action for reinstatement does not present a justiciable controversy and this Court lacks jurisdiction over the subject matter of the suit. The appeal should be dismissed.

2. This suit is barred by laches. The delay of over three years and seven months from the termination of appellant's employment and the filing of the complaint in this action is presumptively prejudicial to the Government and precludes the relief which appellant seeks. *Benson v. Zahner*, No. 15633 (C.A.D.C.) decided November 17, 1960.⁵

Appellant's removal was not subject to the Lloyd-La Follette Act. His appointment to federal employment was made subject to investigation to determine whether he was qualified for federal service. Investigation disclosed that he was not qualified. His removal based on the results of the investigation did not have to comply with procedural requirements of the Lloyd-LaFollette Act.

ARGUMENT

I.

SINCE APPELLANT IS PHYSICALLY UNABLE TO PERFORM THE DUTIES ATTENDANT TO THE POSITION FROM WHICH HE WAS REMOVED, THIS ACTION IS MOOT AND SHOULD BE DISMISSED.

It is firmly established that the courts are not empowered to decide cases which present moot or abstract questions or which would require the court to declare principles or rules of law which can have no operative effect.

⁵ A motion for rehearing in banc was filed in this Court on December 2, 1960.

Mills v. Green, 159 U.S. 651, 653; *Lewis Publishing Co. v. Wymann*, 228 U.S. 610, 615; *Hunter Co. v. McHugh*, 320 U.S. 222, 226; *Ser-Att B. Field v. Wynne*, 62 F. 2d 1052 (C.A. 3); *Johnson-Kennedy Radio Corp. v. Chicago Bears F. Club*, 97 F. 2d 223 (C.A. 7). In *Mills v. Green*, 159 U.S. at 653, the Supreme Court said:

The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

This principle, with roots in the Constitution, calls for a dismissal of this appeal.

By the present suit (and its predecessor) appellant seeks a judicial declaration that he is entitled to be restored to his employment and an injunction requiring a restoration (J.A. 4). It appears, however, that, on appellant's application, the Civil Service Commission on August 8, 1956 determined after investigation that appellant was "totally disabled for useful or efficient service" (5 U.S.C. 710 (1952 ed.)) in his former position with the Post Office. On the basis of this determination appellant was granted a disability annuity, effective November 1, 1955 (App. 15-16), and continuous to the date of this writing (App., 16), benefits are being paid because of appellant's total disability.⁶ In view of appellant's physical inability to perform "useful and efficient service" in his position (see J.A. 41-43), a judgment declaring his right to restoration to his former employment would merely be an abstraction and could not have any operative effect. For this reason we suggest that there is no justiciable controversy before this Court and that the appeal should be dismissed.

⁶ Current benefits are paid pursuant to 5 U.S.C. 2257(d) and amount to \$141 per month (App. 16).

SINCE (1) APPELLANT IS GUILTY OF LACHES AND (2) ALL PROCEDURAL REQUIREMENTS WERE MET IN HIS REMOVAL, THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

A. THIS ACTION IS BARRED BY LACHES.

Assuming that appellant's action for reinstatement is not moot, it nonetheless is barred by laches. The Board of Appeals of the Civil Service Commission upheld the adverse action of its Investigations Division on September 28, 1955; on October 7, 1955, the Post Office Department issued to appellant its final notice of removal. As of October 7, 1955, then, administrative action was final and appellant had exhausted his administrative remedies and was entitled to seek judicial review. *Benson v. Zahner*, No. 15633 (C.A.D.C., decided November 17, 1960). Not until May 22, 1959, however, (over three years and seven months after the final notice of removal) was his complaint in the instant case filed. It is firmly established that, if an individual such as appellant does not exercise diligence in protecting his rights by seeking judicial review within a reasonable length of time, he is guilty of laches and his complaint is barred. The reason is, as the Supreme Court said, in *United States ex rel Arant v. Lee*, 249 U.S. 367, 372, that:

*** a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

See also *Nicholas v. United States*, 257 U.S. 71, over three years found to constitute laches; *Norris v. United States*, 257 U.S. 77, eleven months; *Baxter v. Pace*, 89 App.D.C. 392, 193 F. 2d 20 (C.A. D.C.), three years, ten months; *Drown v. Higley*, 100 App.D.C. 326, 244 F. 2d 774 (C.A.

D.C.), two years, three months; *Benson v. Zahner*, No. 15633 (C.A. D.C., decided November 17, 1960), three years, nine months.

Appellant contended in the court below (J.A. 20, 24-25) that his claim was not barred by laches since he filed his complaint within two months after the Supreme Court denied certiorari in his earlier suit which was dismissed for appellant's failure to substitute indispensable parties. This contention is clearly without merit. The original action was not commenced until a year after administrative termination of his employment. This delay is unexplained and of itself is justification for applying the doctrine of laches. *Norris v. United States*, 257 U.S. 77; see also *Grasse v. Snyder*, 89 App. D.C. 352, 192 F. 2d 35. Moreover, since the failure of appellant to obtain a substitution of parties in his earlier action can only be attributed to his lack of diligence, appellant is chargeable with responsibility for the entire period of delay from the date his removal was final to the date the present suit was filed. This delay amounts to in excess of three and one-half years. A delay of this length in a suit of this character is presumptively prejudicial to the Government and compels a holding that the suit is barred by laches. *United States ex rel Arant v. Lee*, 249 U.S. 367, 372; *Barter v. Pace*, 89 App. D.C. 392, 193 F. 2d 20 (C.A.D.C.); *Benson v. Zahner*, No. 15633 (C.A.D.C. decided November 17, 1960); cf. *Drown v. Higley*, 100 App. D.C. 326, 244 F. 2d 774 (C.A.D.C.).

The *Zahner* case is in all material respects identical to that at bar. There the plaintiff delayed one full year after he had exhausted his administrative remedies before instituting his initial suit, which, as in this case, was dismissed for failure of the plaintiff to substitute newly appointed members of the Civil Service Commission. Two weeks after the dismissal Zahner filed his second complaint, and the defendants asserted the defense of laches. The district court ordered Zahner's reinstatement. This Court in reversing stated:

Absent any evidence to the contrary, appellee's failure to obtain a substitution of parties in the first suit must be attributed to his lack of diligence. This inaction brought about the additional pre-trial delay necessitated by the second suit. We think that, when this delay is added to the appellee's initial delay of one year before bringing any suit after final agency action, the cumulative effect must be viewed as prejudicial to the Government.⁷

B. ALL APPLICABLE PROCEDURAL REQUIREMENTS WERE MET.

Appellant contends (Appellant's Br. 9-10) that he was a member of the "classified civil service" and as such could only be removed pursuant to the provisions of the Lloyd-LaFollette Act, 5 U.S.C. 652(a). The contention is without merit. Appellant was given an "Indefinite Appointment (in lieu of reinstatement)" pursuant to Civil Service Regulation 7.105(a)(1), *supra*, p. 3-4, which delegates authority to the agencies to make such appointments for former employees having a competitive status. Section 2.112, *supra*, p. 4, of the Commission's regulations makes all appointments under Section 7.105(a)(1) conditional upon an investigation which may be made at any time within eighteen months following the appointment; if the investigation discloses that an individual is not qualified for federal employment, removal may be ordered by the Commission. 5 C.F.R. 2.112, *supra*, p. 4. In was pursuant to these regulatory provisions that appellant was appointed and that the Commission acted in ordering his removal.

Appellant argues (Appellant's Br. 7-8) that his conversion to "career appointment," effective on January 23, 1955 (J.A. 29), made him a member of the classified

⁷ Appellant, in the court below, asserted that he is not guilty of laches on the basis of *Ritter v. Strauss*, 104 App.D.C. 301, 261 F. 2d 767 (C.A.D.C.). As pointed out by this Court in the *Zahner* case, *supra*, the circumstances of this case do not present the situation "where delay is caused by a reasonable mistake as to an unsettled matter of law", in which case "the delay is not attributable to lack of diligence. See *Ritter v. Strauss*," *supra*.

civil service and as a consequence he then became entitled to the protections of the Lloyd-LaFollette Act. This conversion was made pursuant to Executive Order No. 10577, *supra*, p. 4-5. Section 201(c) of that Order converted all employees of the "competitive service",⁸ who on the effective date of the order were serving under indefinite appointments made noncompetitively, based upon prior service with competitive status, to career appointments provided they had fulfilled more than three years of such service under permanent appointment. Nothing in that or any other section of the Order removes the requirement that the individual's appointment be subject to investigation. To the contrary, Section 5.2, *supra*, p. 4, provides that the Commission can make such investigations and may require that appointments be made subject thereto. Moreover, that section reasserts that the Commission is empowered to remove an appointee who, upon investigation, is found to be disqualified. Since appellant's original appointment was conditional, and his conversion to "career appointment" did not remove the condition, the Commission was clearly empowered to order his removal, without regard for the procedural requirements of the Lloyd-LaFollette Act.

Further, it is established that, where an appointment is made conditional upon investigation, it can be cancelled or suspended if the investigation reveals anything which demonstrates the appointee's disqualification; and so long as the appointment is so conditioned, the appointee acquires no right to his position which is protected by the Lloyd-LaFollette Act. *Golding v. Weeks*, 96 App.D.C. 192, 225 F. 2d 31 (C.A.D.C.); *Kirkpatrick v. Gray*, 91 App. D.C. 138, 198 F. 2d 533 (C.A.D.C.).⁹

⁸ Section 1.3 (a), *supra*, p. 4, defines "competitive service" as being synonymous with "classified civil service."

⁹ "The public interest appears to require that many appointments be made without waiting for necessary investigations to be completed. It plainly requires that appointments so made be conditional on the results of the investigations." *Kirkpatrick v. Gray*, 91 App. D.C. 138, 198 F. 2d 533, 534 (C.A.D.C.).

In view of the nature of his appointment it is clear that the Lloyd-LaFollette Act did not govern appellant's removal; aside from the Lloyd-LaFollette Act, no other claim of procedural irregularity is asserted. In these circumstances, the district court was clearly correct in granting the appellees' motion for summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

GEORGE COCHRAN DOUB,
Assistant Attorney General

OLIVER GASCH
United States Attorney

JOHN G. LAUGHLIN, JR.,
ROBERT E. POWELL,
Attorneys

December, 1960

APPENDIX

DOCKET ENTRIES FROM PRIOR ACTION

DATE	PROCEEDINGS
1958	
5-22-58	Transcript of record.
5-22-58	Appearances of Richard A. Mehler, George J. Goldsborough and Charles P. Hovis for appellant.
5-26-58	Appearances of Oliver Gasch and Carl W. Belcher for appellee.
7-2-58	Appearances of Morton Hollander and Howard E. Shapiro for appellees.
8-15-58	25 copies of appellant's brief and Joint Appendix, with proof of service.
9-9-58	Typewritten copy of appellee's brief.
9-16-58	25 copies of appellee's brief (filed Sept. 9th) received, and proof of service.
10-30-58	Argued before Fahy, Danaher and Bastian, Circuit Judges.
11-13-58	Opinion by Circuit Judge Bastian.
11-13-58	Judgment affirming the order of the District Court.
11-14-58	Per Curiam order amending the second sentence of the opinion filed on Nov. 13th.
11-28-58	25 copies of appellant's petition for rehearing in banc and certificate of service.
12-17-58	Per Curiam order denying appellant's petition for a rehearing en banc.
12-23-58	Opinion and certified copy of judgment issued to the District Court.
1959	
1-8-59	4 copies of appellant's motion to recall judgment and opinion and stay issuance thereof (MS 1-8).
1-21-59	Order recalling the opinion and certified copy of judgment from the District Court; and staying the reissuance thereof to and including Feb. 21st.

1959

1-21-59

Certified copy of order of Jan. 21st sent to Clerk, District Court.

1-23-59

Certified copy of judgment and copy of opinion returned by Clerk, U.S. District Court.

2-4-59

2 copies of appellant's designation of record (M.S. 2-3-59).

2-5-59

Certified record prepared.

2-24-59

Supreme Court Notice of filing petition for certiorari on Feb. 20th (SC No. 715, Oct. Term 1958).

4-9-59

Certified copy of order of the Supreme Court denying petition for writ of certiorari on April 6th.

4-10-59

Opinion and certified copy of judgment reissued to the District Court.

DEFENDANT'S EXHIBIT I

DISTRICT OF COLUMBIA)
CITY OF WASHINGTON) ss

AFFIDAVIT

I, Andrew E. Ruddock, Director, Bureau of Retirement and Insurance, United States Civil Service Commission, having custody of the retirement records of retired Federal employees, including that of Robert W. Hicks, last employed by the Post Office Department, hereby depose and say:

These records disclose that said Robert W. Hicks was removed from such employment on October 7, 1955, and on March 30, 1956 executed application for annuity under the disability provision (5 U.S.C. 710) of the Civil Service Retirement Act. The Civil Service Commission determined that this former employee was totally disabled for useful and efficient service in his position as required by said statute, and awarded him annuity at the rate of \$128.00 a month effective from November 1, 1955. This rate was increased to \$141.00 effective August 1, 1958 by the terms of Public Law 85-465. He has received this annuity continuously to date, which benefit will continue until the end of the month prior to the annuitant's death unless, before he attains age 60, he is found to be recovered or restored to earning capacity (5 U.S.C. 2257(d)).

ANDREW E. RUDDOCK, Director
Bureau of Retirement and Insurance

Subscribed and sworn to before me this 9th day of
October, 1959.

Notary Public

My Commission expires .

DISTRICT OF COLUMBIA)
CITY OF WASHINGTON) SS

AFFIDAVIT

I, Andrew E. Ruddock, Director, Bureau of Retirement and Insurance, United States Civil Service Commission, having custody of the retirement records of retired Federal employees, including that of Robert W. Hicks, last employed by the Post Office Department, hereby depose and say:

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/s/ Andrew E. Ruddock
ANDREW E. RUDDOCK, Director
Bureau of Retirement and Insurance

Subscribed and sworn to before me this 6th day of
December, 1960.

[SEAL] /s/ Helen E. Sims
Notary Public

My Commission expires 1/14/63.



FILED JAN 10 1984

Stephen H. Smith

CLERK

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15, 979

ROBERT W. HICKS,
Appellant,

v.

ROBERT F. KENNEDY
Postmaster General of the United States, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD A. MEHLER
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Attorneys for Appellant



UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

NO. 15, 979

ROBERT W. HICKS,

Appellant,

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Appellant submits this brief in reply to new matters raised by the Appellees in their brief which Appellant was of the belief should not be anticipated in his original brief filed herein. (Appellant's Brief 4)

THIS ACTION IS NOT MOOT

Appellant has no quarrel with the broad principle for which the Appellees cite authorities to the effect that the duty of a court is to decide

actual controversies and not to make determinations of moot questions or abstract propositions. However, in this situation the principle has no application.

Appellant's total disability was not found to exist until August 8, 1956, upon the basis of which finding the disability annuity commenced retroactive to November 1, 1955. While it may be true that Appellant's disability has persisted to a current date, the fact remains that both his suspension without pay, which was effective August 25, 1955, and his removal, which was effective October 7, 1955, by a substantial period preceded November 1, 1955, the date of the commencement of the payment of his disability annuity. More specifically, the intervals during which Appellant must be conceded to have been physically able to perform his duties were: 68 days in relation to the date of his suspension without pay, and 25 days in relation to the date of his removal.

It follows that the grant to the plaintiff of the relief he seeks would hardly be meaningless. Assuming his reinstatement, he would be entitled:

(a) To file suit in the Court of Claims for back pay from August 25, 1955, the date of his suspension without pay, or at the latest, from October 7, 1955, the date of his removal, to November 1, 1955, the date upon which his disability was found to have commenced.

(b) To 539 hours of sick leave (J.A. 35) which had been accumulated by him during the course of his service and which would have been paid to him at the full rate prior to the commencing of his disability annuity, the latter of which is payable at a much lower rate and which would have been made to coincide with the date upon which his sick leave became exhausted.

(c) To reemployment rights at such time in the future as he may be found to be physically qualified for government service.

There is yet a further cogent reason why this action should be adjudicated. There can be no doubt that the character of the grounds stated by the Civil Service Commission in directing Appellant's removal disparaged and seriously injured his reputation. Having been accused of "false and misleading statements" and having been found without specification to be unsuitable for government employment, it cannot meritoriously be argued that the Court here is dealing with an abstract proposition. In Coffey v. Jordan, 107 U.S. App. D.C. 6, 275 F.2d 1 (1959), this Court made the apt expression in a footnote to its opinion:

"Appellant's suspension had expired before argument of the case in this Court. Nevertheless, the Corporation Counsel, representing Appellee, quite properly conceded that Appellant's obvious interest in vindicating his reputation precludes dismissal for mootness."

In the same spirit in which the Corporation Counsel made the concession in Coffey, it is submitted that the United States Attorney and the Attorney General of the United States should make a similar concession in this case.

THE APPELLANT IS NOT GUILTY OF LACHES

On its facts, the instant case is plainly distinguishable from Benson v. Zahner, No. 15633 (D. C. Cir. decided November 16, 1960).

In prosecuting his appellate remedies from the dismissal by the District Court of his first suit (Hicks v. Summerfield, 104 U.S. App. D.C. 286, 261 F.2d 752, cert. denied, 359 U.S. 959), Appellant was hardly chargeable with a lack of diligence. Indeed it was Appellant's position in his petition for a Writ of Certiorari that the questions involved in that suit were unsettled and of great importance to several million government servants. Neither the failure to substitute parties in his first case nor the carrying on of his appeals from the judgment of the District Court should or can be ascribed to frivolousness. Appellant acted in good faith and at substantial expense in an attempt to gain a judicial decision on an issue which he considered of real import.

The principal delay of which the Appellees complain goes to the period beginning with the administrative termination of his employment and ending with the time Appellant's original action was filed. Appellees say this delay is unexplained and therefore eschews any argument that this case presents a justiciable controversy.

But this delay was abundantly explained and one needs go no further than the uncontradicted affidavits of the Appellant which were filed with the Court below in order to satisfy himself that the plaintiff acted as diligently as he could and more diligently than most would in the circumstances. Specifically, Appellant's affidavit (J.A. 19, 20) revealed that:

"5. By reason of illness which was believed connected with prior government service, affiant was ordered by the Federal Bureau of Employees Compensation to report to the United States Public Health Hospital, Baltimore, Maryland, on November 15, 1955 where affiant continuously remained as a bed patient until about January 16, 1956.

"6. That during the course of such hospitalization, affiant was submitted to surgery on his left foot and for more than a month after his discharge from said hospital, that is, until about mid-February, 1956, was nonambulatory being compelled to use a wheel chair; that thereafter, until about June, 1956, affiant was unable to walk without the use of crutches; and that this disability from walking persisted to a lesser degree until mid-May of 1957, during which latter period he was forced to use a cane.

"7. That during all of this time affiant was either totally or partially disabled and unable to attend to his affairs or business without great difficulty, but that he nevertheless engaged counsel further for the purpose of protecting his rights in this case, as a result of which his original action (CA 4031-56) referred to by the defendants in their points and authorities, was filed on October 5, 1956.

"8. That said civil action was not finally disposed of, and then without prejudice, until April 6, 1959, on which date the Supreme Court of the United States denied the affiant's Petition for Certiorari.

"9. That this action was filed promptly thereafter on May 22, 1959.

"10. That affiant did not apply for disability until April 6, 1956, which was retroactive to November 1, 1955 and then for a disability which was connected with service prior to both his suspension and removal.

"11. That the delay, such as there was, in the bringing of an action following his suspension and removal from Federal employment was not attributable to affiant's fault or intention and that he attempted to the best of his ability and by such means as were within his control to seek the remedy to which he believes he is entitled."

And Appellant's supplemental affidavit (J.A. 40-43), likewise filed with the Court below, to which he attached copies of two medical reports concerning his condition, shows that during the period to which the Appellees address themselves Appellant, in addition to his other ailments, was suffering from a serious heart condition which made it extremely difficult and at times impossible to pursue his business and affairs.

Confronted with such problems of health it seems a wonder that Appellant was able to assert his rights at all in a judicial forum.

THE APPLICABLE PROCEDURAL REQUIREMENTS
WERE ENTIRELY DISREGARDED

Appellees argue that Appellant's original appointment to the Post Office Department was conditional, that his conversion to "career appointment" did not overcome the condition and that the Commission had the authority to order his removal (and presumably his suspension without pay) without regard to the Lloyd-LaFollette Act.

But the Appellees pay no heed to the statement appearing on the notification of personnel action (J.A. 28) that Appellant's "Probationary period completed". Nor can it be said, quoting from this same notification, that because a Federal employee "may be subject to investigation

and approval by the United States Civil Service Commission" that in fact he is so subject. In this case Appellant could not have been so subject since his conversion to career appointment on January 23, 1955 (J.A. 29) was made pursuant to Section 201 (c) of Executive Order No. 10577 (J.A. 30-32), the provisions of which are mandatory and not susceptible of any qualification.

In this connection, it is noteworthy by comparison that the appointments provided for under Sections 201 (a) and 201 (b) of this Executive Order — which have no application to the Appellant — were by their terms made subject to such conditions as the Commission might prescribe. Contrarywise, Section 201 (c) — which does apply to the Appellant — is conspicuously and forcefully absent any Commission authority to prescribe conditions governing the appointments required to be made thereunder. Had the Executive intended otherwise, it would have been an easy matter for him to have said so. That he did say so in some cases and not in others is evidence enough of his intentions.

A casual reading of Appellees' brief on this point can be quite misleading. While Appellees do not dispute that Appellant was appointed under Section 201 (c) of the Executive Order, they go on to argue that even in such deserving cases that a certain "Section 5.2", quoted at page 4 of their brief, gives to the Commission the power to require that appointments be made subject to investigation and upon a finding that the employee is disqualified to instruct the agency to remove him or to suspend him. A careful study, however, of what the Appellees have quoted reveals that this power which the Appellees should like the Commission to have is not endowed under the Executive Order but rather only under Civil Service rules apparently established to implement that order. What this amounts to is an invocation of an authority patently denied the Commission in the Executive Order itself. At the most, this authority to make an appointment conditional and to remove an employee can be validly used only under Sections 201 (a) and (b) and not under 201 (c) which is unconditional in its language, operation and effect.

CONCLUSION

As this Court said in Roth v. Brownell, 94 U.S. App. D.C. 318,
215 F.2d 500:

"Neither the formula of 'excepting' the kind of position a person holds, nor any other formula, can obviate the requirement of the Lloyd-LaFollette Act that 'No person in the classified civil service of the United States shall be removed . . . therefrom' without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear.

"It is immaterial here that the President has long been 'authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof . . . ' 16 Stat. 495, R.S. § 1753, 5 U.S.C. § 631. (Emphasis added.) Complete control over admissions does not obviate the removal requirements of the Lloyd-LaFollette Act."

Respectfully submitted,

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